No. 89-1215 CFX
Status: GRANTED

Docketed
January 29, 1990

Title: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al., Petitioners
v.
Johnson Controls, Inc.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Berzon,Marsha S., Gold,Laurence

Counsel for respondent: Jaspan,Stanley S.

Entry	Date	Note	Proceedings and Orders
1	Dec 7 1989	G	Application (A89-437) to extend the time to file a petition for a writ of certiorari from December 25, 1989 to January 12, 1990, submitted to Justice Stevens.
2	Dec 8 1989		Application (A89-437) granted by Justice Stevens extending the time to file until January 12, 1990.
3	Jan 2 1990	G	Application (A89-437) to extend further the time to file a petition for a writ of certiorari from January 12, 1990 to January 20, 1990, submitted to Justice Stevens.
4	Jan 4 1990		Application (A89-437) granted by Justice Stevens extending the time to file until January 29, 1990.
5	Jan 29 1990	G	Petition for writ of certiorari filed.
6	Jan 29 1990		Appendix of petitioner filed.
7	Mar 1 1990		Brief amici curiae of ACLU, et al. filed.
8	Mar 1 1990		Brief of respondent Johnson Controls, Inc. in opposition filed.
9	Mar 7 1990		DISTRIBUTED. March 23, 1990
10	Mar 15 1990	X	Reply brief of petitioner International Union, United Automobile, Aerospace, etc. filed.
11	Mar 15 1990		Lodging received and distributed.
12	Mar 26 1990		Petition GRANTED.
			**********
14	Apr 5 1990		Order extending time to file brief of petitioner on the merits until May 24, 1990.
15	May 7 1990		Order further extending time to file brief of petitioner on the merits until June 1, 1990.
16	May 23 1990		Brief amicus curiae of California and the California Fair Employment & Housing Com. filed.
17	May 31 1990		Brief amici curiae of Assn. of the Bar of the City of New York, et al. filed.
18	Jun 1 1990		Brief amicus curiae of Natural Resources Defense Council filed.
19	Jun 1 1990		Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed.
20	Jun 1 1990		Brief amicus curiae of Trial Lawyers for Public Justice filed.
21	Jun 1 1990		Brief amicus curiae of Massachusetts, et al. filed.
22	Jun 1 1990		Joint appendix filed.
23	Jun 1 1990		Brief of petitioners International Union, et al. filed.
24	Jun 1 1990		Brief amicus curiae of United States filed.
25	Jun 1 1990		Brief amici curiae of American Public Health Assn., et al.

No. 89-1215-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
26	Jun 1 1990		Brief amici curiae of ACLU, et al. filed.
27	Jun 1 1990		Brief amici curiae of Equal Rights Advocates, et al. filed.
29	Jun 6 1990		Order extending time to file brief of respondent on the merits until July 19, 1990.
30	Jul 17 1990		Brief amicus curiae of United States Catholic Conference filed.
31	Jul 19 1990		Brief amici curiae of Pacific Legal Foundation, et al. filed.
32	Jul 19 1990		Brief amici curiae of Equal Employment Advisory Council, et al. filed.
33	Jul 19 1990		Brief amicus curiae of Concerned Women For America filed.
34	Jul 19 1990		Brief amicus curiae of The Washington Legal Foundation filed.
35	Jul 19 1990		Brief amicus curiae of Chamber of Commerce of the United States filed.
36	Jul 19 1990		Brief of respondent Johnson Controls, Inc. in opposition filed.
38	Jul 19 1990		Brief amicus curiae of Industrial Hygiene Law Project filed.
39	Jul 19 1990		Brief amicus curiae of National Safe Workplace Institute filed.
37	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 10, 1990. (1ST CASE)
40	Jul 26 1990		CIRCULATED.
41	Aug 3 1990	X	Supplemental brief of respondent Johnson Controls, Inc. and lodging filed.
42	Aug 21 1990		Record filed.
		*	Certified original record received from USCA 7.
43	Aug 22 1990	X	Reply brief of petitioner International Union, United Automobile, Aerospace, etc. filed.
44	Aug 27 1990		Record filed.
		*	Certified copy of original record, box, received.
45	Oct 10 1990		ARGUED.

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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

LIST OF PARTIES TO THE PROCEEDING

The plaintiffs in the district court, appellants in the court of appeals and petitioners in this Court, are: the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweatman, Linda Burdick, Elsie Nason, Mary Estalled Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.

The defendant in the district court, appellee in the court of appeals, and respondent in this Court is Johnson Controls, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, *et al.*, plaintiffs in the district court and appellants in the court of appeals, petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review the judgment in *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. No. 88-1308; Sept. 26, 1989).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 886 F.2d 871, and is reproduced at pp. 1a-101a of the separately bound appendix to this *certiorari* petition (hereinafter "Pet. App."). The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 680 F. Supp. 309, and is reproduced at Pet. App. 102a-120a.

JURISDICTION

The Court of Appeals' opinion and judgment were issued on September 26, 1989. On December 8, 1989, Justice Stevens signed an order extending the time for filing a *certiorari* petition to and including January 12, 1990. On January 4, 1990, Justice Stevens signed an order further extending the filing date to and including January 29, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are set out at Pet. App. 145a-46a.

STATEMENT OF THE CASE

Johnson Controls, Inc. ("the employer" or "the company") is a manufacturer of batteries. Occupational exposure to lead, the primary material used in the battery manufacturing process, entails a health risk to workers, including a risk of harm to fetuses conceived by workers. Pet. App. 32a.

This case concerns the question whether Johnson Controls is permitted, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to ban women who cannot prove infertility, but no men, from: jobs in which *one* employee in the last year had a blood lead level reading beyond that the company considers safe for fetuses carried by pregnant women; jobs which are performed in areas in which the air lead level reading exceeds that which the company considers safe for fetuses; *and* all jobs in lines of progression which contain any banned lead-exposed positions.

On the defendant company's motion for summary judgment, the Disrtict Court upheld the employer's policy. After briefing and oral argument before a panel of the Seventh Circuit, but in advance of issuance of any opinion, the Court of Appeals as a whole decided that

the issues presented by this case are of sufficient consequence to warrant hearing *en banc*. Pet. App. 2a.

The resulting *en banc* decision concluded, by a 7-4 vote, that Johnson Controls is entitled to maintain its policy despite the fact that the policy explicitly disadvantages women on the basis of gender, and does so for reasons entirely unconnected to ability of women to perform their assigned employment tasks.

Judges Posner, Easterbrook, and Cudahy filed dissenting opinions, and Judge Flaum joined in Judge Easterbrook's dissent.

A. The Facts

1. *The Exclusion of Women from Battery Manufacturing Positions*

In 1977, Johnson Controls instituted its official policy regarding the employment in lead-exposed jobs of women who cannot demonstrate that they are infertile. At that time, the employer was of the view that:

> [P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> We believe that pregnancy is almost always a voluntary act and that the subsequent bearing of child is voluntary. Since not all women who can become pregnant wish to become mothers, . . . it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant. [Beaudoin Aff., Exh. J.]

Consistent with that view, the company suggested, but did not require, that women who wished to do so choose non-lead exposed jobs where such jobs were availab'e. The company did not, however, provide any guaranteed transfer for women who wished to leave lead-exposed

jobs, nor did the company protect the prior wage rate of any woman who did transfer for that reason.

In 1978, OSHA announced its Final Standard for Occupational Exposure to Lead. 43 Fed. Reg. 52952 et seq. (1978); 29 C.F.R. § 1910.1025 (1987). When that standard was being considered, OSHA devoted particular attention to the question whether the possible effects on fetuses carried by pregnant workers justified excluding women entirely from at least certain lead-exposed positions. 43 Fed. Reg. 52960 ("No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry.").

On the basis of its close study of the question, OSHA concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52966; *see also, e.g.*, 43 Fed. Reg. 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." 43 Fed. Reg. 52966.[1] The Agency stated in addition:

> The record in this rulemaking is clear that male workers may be adversely affected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. . . . Effective compliance with all aspects of this standard will minimize the risk to all persons and should therefore insure equal employment for both men and women. [43 Fed. Reg. 52966.]

[1] Those protections, based upon the recognition that workers who are planning families should have blood lead levels below 30 μg/dl, included periodic blood lead level tests and air monitoring beginning at a 30 μg/m3 *air* lead level; medical surveillance, including fertility testing and the right to have review by several physicians; educational and training provisions, so that "workers are fully informed of the potential hazards from exposure to lead on their reproductive ability, during pregnancy and following birth"; and, where workers are planning families and reduction of blood lead levels is medically indicated, the possibility of temporary removal from lead-exposed jobs, with wage protection and assured possibility of return to the lead-exposed position for up to eighteen months. 43 Fed. Reg. 52966.

In 1982, Johnson Controls, despite its own earlier pronouncements and those of OSHA, announced a broad exclusion of women from lead exposed jobs:

> It is [Johnson Control's] policy that women who are pregnant *or who are capable of bearing children* will not be placed into jobs involving lead exposure *or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.* [Pet. App. 9a (emphasis supplied).]

Johnson Controls' policy was applied to particular positions based not on the average or mean blood level of the job incumbents, but upon whether a *single* individual in that position, at any time in the preceding year, showed a blood lead level of more than 30 μg/dl. Pet. App. 5a. In addition, a job is banned if the *air*-lead level is more than 30 μg/m3, even though such an air-lead level reading is likely to produce a blood-lead level much lower than 30 μg/dl. 45 Fed. Reg. 52960-61. Moreover, even though the company allowed *incumbent* women employees to remain in lead-exposed positions if, on the basis of individual blood-lead level monitoring, those incumbents were able to keep their blood lead at the level the company considers safe for fetuses, the employer did *not* allow any women seeking to be hired or promoted into lead-exposed positions to demonstrate through individual blood monitoring an ability to keep her blood lead level below 30 μg/dl.[2] In addition, as already noted, the ban

[2] The company's explanation for its refusal to provide for *individual* testing for dangerous blood lead levels was, in part, to avoid frequent blood level testing and, in addition, that "the potential for greatest exposure [to lead] is right at the outset while the employee is learning the proper work practices." Beaudoin Dep. at 163; *see*

extended beyond the jobs actually exposed to lead; there is no explanation in the record of any health or safety basis for the breadth of the ban. Finally, the company insisted on banning *all* women who could not prove their infertility from lead-exposed jobs, regardless of their family status, age, sexual orientation, or expressed intention to bear children.

The sum of the matter is that, in practical terms, the company's policy was to bar women capable of bearing children from *all* manufacturing jobs in its battery plants (except a few held by incumbent women). Pet. App. 97a; Ross Depo. Ex. 8. .

2. *Harms Caused by Lead*

Lead is a toxic substance that can cause a wide range of health problems in men, women, and children, depending upon the exact exposure level. *See, e.g., United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1248-49 (1980), *cert. denied* 453 U.S. 913 (1981). In particular, "at least one part of the body, the reproductive system, begins to suffer very serious subclinical effects at 30 ug/100g of lead in the blood." *Id.* Those effects, according to OSHA, include *both* a risk to fetuses carried by pregnant employees resulting from lead exposure *in utero and* other serious impacts upon the reproductive systems of *both* men and women:

> The rulemaking produced ample evidence confirming the grave danger lead poses to prospective mothers and fetuses . . . OSHA [also] found evidence that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm (teratospermia), decreased motility of sperm (asthenospermia), and decreased number of sperm (hypospermia). . . . Older studies found alarmingly

Pet. App. 10a. The company did not explain why proper training on hygiene techniques could not be provided *before* an employee begins work at a lead-exposed position.

> high rates of sponteneous abortion, stillbirth, and birth defects in the pregnancies of women married to lead-exposed workers . . . Other studies found chromosomal abnormalities among lead exposed [male] workers.
>
> OSHA thus found abundant support for the view that a lead standard must protect the reproductive capacities of males as well as females. [647 F.2d at 1257.]

On the basis of its lengthy consideration of the issue, OSHA decided that

> because of the demonstrated adverse effects of lead on reproductive function in both male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 microgram/100 g maximum permissible blood level in *both males and females who wish to bear children.* [29 C.F.R. § 1910, pp. 833-34 (emphasis supplied).]

The District of Columbia Circuit approved this finding as well supported by the extensive administrative record. *United Steelworkers of America v. Marshall*, 647 F.2d at 1248-49.

Not surprisingly given this background, there was no dispute among the experts in this summary judgment case on the basic fact that, as OSHA had concluded, lead poses a risk to fetuses of pregnant workers at the 30 μg/dl blood lead level.[3] The summary judgment record

[3] At the relatively low blood lead levels which Johnson Controls regards as sufficient to bar fertile women, the primary risk is that the children born will have "very subtle" learning problems, and may exhibit behavioral problems such as hyperactivity. Pet. App. 15a, 16a. The record is undisputed on the fact that, contrary to the Court of Appeals' statement, Pet. App. 17a, fetal lead exposure at the levels involved in this case does *not* cause structural abnormalities in vital organs, *e.g.*, Chisolm Depo. 27, 29, 40, 41, 47; Whorton Depo. 4-5.

There was some evidence, including a Center for Disease Control ("CDC") Report, that the risk of cognitive and behavioral harm to

here does not, however, address at all the significance of that risk. There is no evidence, for example, whether, at the blood lead levels here at issue, the likelihood of *any* harm to a child of an exposed women employee is one in ten, one in a hundred, one in a thousand, or one in a million. *See* Pet. App. 90a (Easterbrook, J., dissenting).[4]

There was, in addition, directly *conflicting* evidence in the summary judgment record concerning the *other* harms caused by lead at the blood lead levels enforced by Johnson Controls for fertile women. There was evidence both supporting and disputing OSHA's conclusion that at the 30 μg/dl blood lead level, the reproductive capacities, and the health of potential children, of *both* men and women were at significant risk.

The plaintiffs' experts were uniformly of the view that, as OSHA had concluded, the available evidence, including animal *and* human studies completed after the OSHA record was closed, support the conclusion that at the 30 μg/dl blood lead level, there is a significant risk of injury to the male reproductive system, including effects on the pregnancies of wives of male employees.[5] Defend-

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children exposed to lead *in utero* occurs at blood lead levels lower than 30 μg/dl. *See* Pet. App. 14a. Johnson Controls, however, only purports to enforce a blood lead level of 30 μg/dl, the level OSHA held to be an appropriate benchmark for both men and women intending to have children. And OSHA, not the CDC, is the agency charged by Congress with determining the appropriate occupational health standard for male *and* female workers after, considering whether there is a significant risk due to various levels of occupational exposure. 29 U.S.C. §§ 651(b)(3) & 655(b)(5).

[4] There was some conflict in the competing affidavits on: precisely how and when harm to the fetus through the mother occurs; and how that risk compares to the risks to adults posed by lead, and to other fetal risks women encounter in their daily lives.

[5] In stating that the plaintiffs' experts had no human studies to rely on, the Court of Appeals was simply wrong. For example,

ant's experts maintained, to the contrary, that there was either no evidence of a reproductive effect on males or of a fetal effect mediated through males, or that there was no evidence of such effects at the 30 μg/dl blood lead level at issue in this case. Pet. App. 33a; Whorton Aff. ¶ 7; Chisolf Aff. ¶¶ 7-8; Hammond Aff. ¶¶ 6-7.

There was also evidence presented by the plaintiffs' experts, backed by *both* animal and human studies reported in scientific papers, that there is a significant risk to the health of *adult* men and women at the 30 μg/dl blood lead level, including neurological and cardiovascular injury and an increased likelihood of certain forms of cancer. One of the plaintiffs' experts noted, for example, that recent studies of adults males show that they suffer a significant increase in high blood pressure at 15-25 μg/dl blood lead level. Silberbeld Depo. 68-69, 87.[6]

Defendant's experts denied any such effects at blood levels below 50 μg/dl in general terms, but did not specifically refer to or dispute the evidence relied upon by

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those experts referred to, *inter alia*, one study by the National Institute of Occupation Safety and Health (NIOSH) of male lead battery plant workers, concluded in 1984, that reported a significant loss of fertility in families where the men had been exposed to lead, including a 25% loss of fertility where the male worker had a blood lead level of 25-33 μg/dl and the wives had blood lead levels much lower.

[6] The Environmental Protection Agency ("EPA") relied upon these studies in considering the further reduction of lead in gasoline. *See* 50 Fed. Reg. 9400-01 (1985) (EPA discussion of studies demonstrating that adult males are subject to an increased risk of high blood pressure, with resultant dangers of heart disease and strokes, at blood lead levels well below those which Johnson Controls considers safe for fertile women); Marcus and Cothern, *The Characteristics of An Adverse Effect: Using the Example of Developing a Standard for Lead*, 16 Drug Metabolism Reviews 423, 430 (1985-86) ("if blood lead levels were lowered from 17 to 10 micrograms/deciliter there would result in savings of a minimum of 50,000 [heart attacks], 70,000 strokes and 25,000 predicted deaths over a 10-year period").

the plaintiffs' experts. Whorton Aff. ¶¶ 6, 8; Scialli Aff. ¶ 10; Chisolm Dep. at 15.

B. The Proceedings Below

This challenge to Johnson Control's policy excluding fertile women from battery manufacturing jobs was filed by eight employees, certified as representatives of a class of similarly situated employees, and the union representing them, the International Union, UAW. Among the individual plaintiffs were one female employee who submitted to sterilization in order to avoid loss of a desireable position, Complaint ¶ 79; several female employees (one of whom was fifty years old and divorced) who were transferred from lead-exposed positions, with loss in compensation, Complaint ¶¶ 56, 66, 67, 72, 75, 79; two female employees who were unable to transfer into lead-exposed positions to which they were otherwise entitled, with resulting loss of income and employment advancement opportunity, Complaint ¶ 79; and one male employee who sought a leave of absence for the purpose of lowering his blood lead level because he intended to become a father and was constructively discharged for making the request, Complaint ¶ 79 & Ex. I.

After discovery, the defendant company sought, and the District Court granted, summary judgment. That court held:

> Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory . . . [Pet. App. 116a.]

The District Court therefore treated the explicit gender-based discrimination in this case as if the employer followed a neutral policy that only has a disparate *impact* upon women as a group. Pet. App. 117a. And, in analyzing this proceeding as a disparate impact case, the District Court applied an "expanded business necessity defense," permitting an employer's interest in protecting the potential offspring of employees to constitute such a defense. Pet. App. 116a-117a.

The *en banc* court of appeals majority affirmed, on doctrinal grounds even broader in their potential application than those adopted by the District Court.

First, the Court of Appeals agreed with the District Court that where an employer purports to justify discrimination against women that explicitly takes gender into account on grounds connected to the health of potential off-spring "a business necessity defense may be utilized." Pet. App. 27a. The Court of Appeals, citing this Court's opinion in *Ward's Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2125-26 (1989), then *placed on the plaintiff, not on the defendant*, the burden of persuasion on the key evidentiary issues that purportedly justify departure from ordinary disparate treatment analysis. Pet. App. 28a-32a.

Specifically, under the Court of Appeals' analysis, once the employer indicates that its motive for a job exclusion policy explicitly based upon gender is protection of fetal health, the *plaintiff* must prove that it is more likely than not: (1) that there is *no* substantial risk of harm to the fetus a women employee may be carrying from the workplace substance or process said to endanger fetal health, Pet. App. 32a; *or* (2) that the risk of harm to fetal health is *not* "substantially confined to fertile female employees," Pet. App. 33a; *or* (3) that there are alternative policies which would protect against the risk of fetal harm equally well, with less discriminatory impact, Pet. App. 37a.

The Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs—especially with respect to the second of these issues—was essential to its ultimate affirmance of summary judgment for the defendant company. Pet. App. 30a, 31a, 33a. In particular, in considering whether the plaintiffs had met their putative burden of proof as to the second issue, the Court

of Appeals recognized that the plaintiffs' experts had relied on animal studies from which those experts concluded that there is a risk of fetal injury mediated through lead-exposed male workers, and ruled that

> animal research does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead. [Pet. App. 34a.]

Second, the Court of Appeals adopted an alternative theory for upholding the District Court's judgment in favor of the company. Although the District Court had declined to reach the issue, the Court of Appeals decided that "Johnson Controls' fetal protection policy could be upheld [on summary judgment] under the bona fide occupational qualification defense." Pet. App. 42a. Where a business may present some dangers to the health of a fetus carried by an employee, protection of the fetus, said the Court of Appeals, is part of the "essence" of the business even though fertile women are fully able to carry out the job's tasks without danger to the company's customers or to their fellow employees. Pet. App. 48a. And the court of appeals majority found that the employer's specific policy here was "reasonably necessary" to protecting fetal health, despite the absence of *any* explanation in the record for several aspects of the employer's policy (such as the failure to individually monitor blood lead levels and to provide adequate training for new lead-exposed employees). *See* Pet. App. 72a (Posner, J., dissenting).

The four dissenters wrote three dissenting opinions. Judge Posner and Judge Cudahy were of the view that a case such as this one must be analyzed as a disparate treatment case, *not* as a disparate impact case; that the burden of proof as to any justification for the employer's policy must be on the employer, *not* on the plaintiff; and that, while an affirmative bona fide occupational qualification defense ("bfoq") *may*, in very narrow circumstances, be available for justifying fetal protection policies, it was entirely inappropriate to grant summary judgment for the employer on that defense on the record here. Pet. App. 60a, 70a, 73a.

Judge Easterbrook wrote a lengthy dissenting opinion that made three essential points:

First, under Title VII, as modified by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"),[7] and as interpreted uniformly in this Court's cases, a policy that explicitly discriminates on the basis of capacity to bear children constitutes disparate treatment on the basis of gender, regardless of the employer's purpose in adopting the policy; thus, the only available defense is the affirmative bfoq defense and not a broader legitimate business justification defense. Pet. App. 75a-81a.

Second, the proffered justification for the employer's fetal protection policy—the moral imperative of protecting fetal health from mistaken parental risk assessments—does not, as a matter of law, meet the PDA standard of equal treatment of employees "similar in their ability or inability to work", and is not a basis for a legally cognizable bfoq defense. Pet. App. 84a.

Third, even on the disparate impact theory adopted in the alternative by the court of appeals majority, the record here does not provide a sufficient basis for rejecting OSHA's conclusion that exclusion of women from a lead-exposed workplace is *not* justified by the scientific evidence. Pet. App. 93a-99a. In particular, "the medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too 'speculative'. Often animal studies are the best foundation for decision." Pet. App. 96a.

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[7] The majority opinion does not mention the PDA.

REASONS FOR GRANTING THE WRIT

This case presents a Title VII gender discrimination question of great theoretical and practical importance. As Judge Easterbrook stated in his dissenting opinion below:

> This is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks . . . Whether that would happen is of course a separate question. . . . But the law would allow employers to consign more women to "women's work", while reserving better-paying but more hazardous jobs for men. Title VII was designed to eliminate rather than perpetuate such matching of sexes to jobs. [Pet. App. 99a-100a.]

The three courts of appeals that have treated with the question in this case have left the law on employer fetal protection policies that bar women from certain jobs in total disarray. While all agree that an employer policy of this kind substantially disadvantages women and is thus invalid unless justified in some manner, those courts disagree entirely upon the critical issues of the evidentiary burdens to be borne by each party in the proof of the applicable justification and even on the substantive content of that justification.

In particular, the majority opinion in this case flatly conflicts with its predecessors—*Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984)—in two basic regards, each of which is of sufficient importance to be outcome determinative in this case:

First, the majority below determined that an employer may justify a policy that explicitly discriminates against women simply by *coming forward with evidence of* a

fetal protective motive. In contrast, the Fourth and Eleventh Circuits—and this Court in *Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989)—place *a normal burden of persuasion* with regard to any applicable statutory justification squarely upon the employer.

Second, the majority below also held that protection of fetal health is a legally proper basis for a bona fide occupational qualification defense ("bfoq") to explicit gender-based discrimination. The Fourth and Eleventh Circuits, however, hold that because concerns about fetal health are unrelated to the ability of women to perform their jobs, such concerns are *not* a proper basis for a bfoq defense.

Each of these holdings significantly narrows Title VII's prohibition against gender discrimination; indeed, taken together, the Court of Appeals' rulings in these two regards effectively insulate employer fetal protection policies such as the one here from Title VII scrutiny. At least equally to the point, both of these rulings are contrary to well-settled Title VII principles governing employer policies that discriminate against women on their face as declared by this Court.

In addition, the holding of the court below that animal studies can *never* constitute substantial evidence of risk to humans, is both vital to its result and squarely in conflict with several decisions of the District of Columbia Circuit,[8] a plurality opinion of this Court[9], and the long-standing practice of a myriad of federal agencies involved in risk analysis and regulation.

All the foregoing being so, this case plainly calls for this Court's review.

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[8] *Environmental D.F., Inc. v. Environmental Pro. Agcy*, 510 F.2d 1292 (D.C. Cir. 1975); *Environmental Defense Fund Inc. v. E.P.A.*, 548 F.2d 998, 1005-10 (D.C. Cir. 1976); *Public Citizen Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986).

[9] *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980).

I. Title VII Analysis

A. (1) The company's fetal protection policy explicitly and overtly denies women employment opportunities because of their gender: *All* fertile women, but *no* fertile men, are precluded from holding certain jobs.[10] Moreover, even if the company's policy drew a line of demarcation that, as the Court of Appeals evidently thought, turned instead upon some aspect of childbearing that is unique to women, the policy would still constitute discrimination overtly based on sex.

In 1978, Congress squarely addressed the question whether a distinction centering upon a woman's childbearing capacity is a distinction "on the basis of sex," and concluded that the answer is "yes." [11] And Congress took this approach precisely because the Legislature rec-

[10] While not all women are precluded from those jobs—since sterilized, infertile, or post-menopausal women are not affected—that consideration does not make the line of differentiation one that is any less squarely based on gender: both men and women are capable of procreating in the future; because the policy nonetheless creates "one hiring policy for women and another for men —each having [the capacity to procreate]," it is policy that draws a direct gender-based distinction. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

[11] The PDA provides:

> The terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes . . . as other persons not so affected but similar in their ability or inability to work. [Title VII § 701(k), 42 U.S.C. § 2000e(k).]

Congress specifically wrote this broad language to make clear that discrimination premised in any way on women's capacity to bear children *is* discrimination based squarely on gender, and not a facially neutral employment policy. *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 677-679 (1983); *see* S. Rep. No. 95-331 (95th Cong. 1st Sess. 1977) at 3-4 ("[T]he bill defines sex discrimination . . . to include those physiological occurrences peculiar to women"); H. Rep. No. 95-948 (95th Cong. 2d Sess. 1978) at 3.

ognized that in large part, the problems women have encountered in the job market have resulted from adverse treatment because of childbearing capacity:

> Women are still subject to the stereotype that all women are marginal workers. Until a women passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women. . . . [S.Rep. 95-331, *supra*, at 6-7.]

Thus, the company's fetal protection policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702, 711 (1978). *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985); *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). As *Manhart* makes clear, the practice therefore "constitutes discrimination and is unlawful unless exempted by . . . some . . . *affirmative* justification." 435 U.S. at 711 (emphasis supplied).

Just last term, this Court reiterated in no uncertain terms that where a plaintiff proves an employment policy that overtly distinguishes between employees on the basis of gender, she has proven a case of illegal employment discrimination unless the *employer* carries the burden of demonstrating that some *exception* to Title VII's proscription of gender-based distinctions applies under the circumstances:

> We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. . . . [O]ur assmption has always been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. [*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789.]

(2) The Court of Appeals' decision in this case is entirely inconsistent with these well-established principles. That decision holds that a policy that explicitly discriminates on the basis of gender is to be treated on the same basis as a policy neutral on its face, with only a disparate impact upon women. But this Court's cases make it clear that these two classes of cases are entirely distinct.

A case in which a plaintiff proves that "an employer has treated [a] particular person less favorably because of the plaintiff's . . . sex" is a straightforward "*disparate treatment case*," and such proof of intentional discrimination is all that the plaintiff need show to make out her case. *Watson v. Fort Worth Bank and Trust Co.*, —— U.S. ——, 108 S. Ct. 2777, 2784 (1988) (emphasis added).

In contrast, where a plaintiff *cannot* "prove intentional discrimination," but can only demonstrate a "facially *neutral* employment practice[] that [has] significant adverse effects on [a] protected *group*," the plaintiff may still be able to prove a Title VII case, but "[t]he factual issues and the character of the evidence are inevitably somewhat different" than in a disparate treatment case. *Watson v. Fort Worth Bank and Trust Co.*, 108 S. Ct. at 2784 (emphasis added). Specifically where a plaintiff *cannot* prove that a distinction was made taking gender into consideration, then the plaintiff must identify the specific employment practice complained about, prove its discriminatory impact, and "bear[] the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Ward's Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2126 (1989).

As a consequence of treating this facial discrimination case as one tantamount to a disparate impact case, the Court of Appeals, citing *Wards Cove*, placed on the plaintiff the responsibility of *disproving* the legitimacy of the employer's fetal protection justification. But as *Ward's Cove* explained, in a true disparate impact case,

once the employer has articulated a legitimate neutral basis for his actions "[t]he persuasion burden . . . must remain with the plaintiff" for the reason that it is the plaintiff "who must prove that it was 'because of such individual's race, color,' etc. that he was denied a desired employment opportunity." 109 S. Ct. at 2126. Precisely because the employer practice at issue in such a case is neutral on its face only by overcoming the defendant's proffered non-discriminatory reason can the plaintiff prove Title VII discrimination. In contrast, here and in any case in which the plaintiff proves that the employer follows an employment practice that overly distinguishes between men and women, the plaintiff has met her burden of proving discrimination and can not be made to do so a second time. *Price Waterhouse v. Hopkins, supra*; *City of Los Angeles Department of Water v. Manhart, supra.*

(3) The Court of Appeals, in reaching its contrary conclusion purported to follow the lead of the Fourth Circuit in *Wright v. Olin Corp., supra*, and of the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital, supra.*[12] But both

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[12] The majority opinion suggests that the EEOC as well has applied a disparate impact analysis to fetal protection policies. Pet. App. 25a-26a. However, the EEOC has just issued a document entitled "Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.* . . . ." That document (which appears, for the Court's convenience, as appendix G to this petition) "clarifies the Commission's position on the proper legal analysis to be applied to charges challenging fetal protection policies." Pet. App. 127a. In that clarification, the EEOC makes plain that Commission never sanctioned the position ultimately adopted by the Seventh Circuit, and regards that position as "a significant departure from the analytical framework previously developed by the courts and endorsed by the Commission." Pet. App. 132a. In particular, the EEOC agrees with plaintiffs that:

> Fetal protection policies . . . are not neutral rules to which adverse impact analysis applies. Instead . . . policies which exclude only women constitute *per se* violations of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct proof of a facially discriminatory policy

of those courts explicitly held that on the issues of the significance of any fetal risk and of whether the risk is one that is only transmitted through women, the burden of persuasion as to whether the employer's policy is within a statutory exception to the non-discrimination principle *is on the defendant employer, not on the plaintiff*. *Wright*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548. Indeed, this Court last term pointed to *Wright* and *Hayes* as examples of the principle that where an employer's action is overtly discriminatory, it is the *employer* that must bear the burden of justifying the apparent discrimination. *Price Waterhouse v. Hopkins*, 109 S.Ct. at 1789.

As the attention this Court gave to burden of persuasion issues last term in *Price Waterhouse v. Hopkins*, *supra*, and *Ward's Cove Packing Co. v. Atonio*, *supra*, suggests, the result in Title VII cases often turns upon which party bears that burden. Where, as here, the issues to be proven turn in whole or in part on current

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is wholly inconsistent with settled Title VII law. [Pet. App. 133a.]

Moreover, the Commission has now determined, in light of the Court of Appeals opinion in this case, that any "hybrid approach to fetal protection is problematic." Pet. App. 134a. Instead, the Commission would analyze fetal protection cases solely in terms of whether the employer can make out a bfoq defense. While, like Judge Posner, the EEOC would not exclude entirely the possibility of such a defense based upon fetal concerns, the Commission would apply that defense in a manner entirely different than the Court of Appeals did here. Pet. App. 134a-39a. Further, in its recent clarification, the Commission expressly states its view that summary judgment was inappropriate here, given the conflicting evidence, the court's exclusion of animal studies, and the court's refusal to "defer to pertinent conclusions by pertinent government agencies [here, OSHA]." Pet. App. 139a-41a.

The EEOC's position on the fetal protection issue has, of course, taken several turns. *See also* 45 Fed. Reg. 7514 (1980), 46 Fed. Reg. 3916 (1981) (announcing for public comment and then withdrawing a proposal for formal guidelines on this question). For present purposes, however, what is important is that the agency charged with enforcement of Title VII agrees that the Court of Appeals' general approach has no sound basis in Title VII.

scientific understandings and those understandings are based on only limited research, the proper allocation of the burden of persuasion is a dispositive consideration. Indeed, as *Hayes* notes, "there is, within the scientific community, a certain amount of subtle bias that has focused research on the hazardous effects of workplace substances as they pertain to reproductive health on women more than men." 726 F.2d at 1549.

Thus, particularly on the question whether a specific practice or substance adversely affects male employees' reproductive capacity and/or the health of potential children of male employees, the placement of the burden of persuasion will likely control the outcome. That was certainly so in this case: the Court of Appeals stressed that its reason for approving a grant of summary judgment for the defendant company—even though there was evidence presented on both sides of the issue of the mediation of the fetal impact of lead through the male—was that the evidence on that issue presented by the plaintiff was, in that court's view, insufficient to meet the burden of persuading the trier of fact that such effect is more likely than not. Pet. App. 30a, 31a, 33a.

B. As an alternative to its disparate impact theory, the Court of Appeals in this case held also that the employer's interest in protecting fetal health is a legally cognizable affirmative defense to a disparate treatment case, as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." Title VII § 703(e), 42 U.S.C. § 2000e-2(e). Again the court below erred; and again its ruling is in conflict both with the Title VII principles stated by this Court and with the rulings of the Fourth and Eleventh Circuits.

The bfoq provision states the only explicit statutory exception to the rule that an employment policy that expressly denies employment opportunities on the basis of gender is unlawful. *Phillips v. Martin Marietta Co.*, 400 U.S. at 544; *Dothard v. Rawlinson*, 433 U.S. 321, 332-33

(1977); *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-84 & n. 13 (1983); *see Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789.[13] And this Court has addressed the question of the kind of employer interest that will support a bfoq defense twice. *Dothard v. Rawlinson*, *supra*; *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).[14] *See also Trans World Airlines v. Thurston*, 469 U.S. at 122-124.

Those cases stress that the bfoq defense "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Dothard v. Rawlinson*, 433 U.S. at 333. Moreover, the Court ruled that, as the statutory language suggests, a job qualification, to constitute a bfoq, must be related to the "essence," *Dothard*, 433 U.S. at 336, 337, or the "central mission of the employer's business," *Western Air Lines v. Criswell*, 472 U.S. at 413. Most to the point here, *Dothard* indicates that an employer's paternalisitc concern for a woman's personal safety does *not* meet this standard, since "it is the purpose of Title VII to allow the individual women to make [the] choice for herself . . . [whether] to weigh and accept . . . risks of employment." 433 U.S. at 335.

Based upon the foregoing, both the Fourth and Eleventh Circuits concluded that protection of an employee's

[13] *Price Waterhouse* noted that "some courts"—citing *Hayes v. Shelby Memorial Hospital*, *supra*, and *Wright v. Olin Corp.*, *supra*—have suggested that there is an additional, implicit affirmative defense where an employer contends that "its limitations on the work that it allows a pregnant women to perform are necessary in light of her pregnancy." 109 S. Ct. at 1789. *Price Waterhouse* did not, however, purport to endorse the existence of any such exception in addition to the exceptions Congress chose to provide. And, as we suggest below, there is no basis for importing such an exception into the statutory scheme. *See* pp. 22-24 *infra*.

[14] *Criswell* was decided under the Age Discrimination in Employment Act ("ADEA"), not under Title VII. However, as *Criswell* itself recounts, the relevant bfoq language in the ADEA was borrowed directly from Title VII, and has always been understood as identical in its intent and reach to the parallel provision in Title VII. 472 U.S. at 411-412, 413 n.18, 414 n.19, 416.

fetus or potential fetus is no more the type of employment interest that can constitute an "*occupational* qualification" than is protection of the woman herself. *Wright*, 697 F. 2d at 1187 (a bfoq cannot be based on a fetal protection motive, because "properly applied, this statutory defense is a narrow one . . . under which a concededly discriminatory occupational qualification is shown to be justified because related to the very ability of the disqualified person to perform the job."); *Hayes*, 726 F.2d at 1549 ("the BFOQ defense is available only when an employer can show that the excluded class is unable to perform the duties that constitute the 'essence' of the job . . . '[P]otential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the BFOQ issue.'"). *See also Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980).[15]

In direct opposition to those holdings, the Court of Appeals in this case held that the company's interest in overriding a woman's own assessment of the risks of lead exposure during pregnancy is "reasonably necessary" to the "essence" of a battery manufacturer's busi-

[15] As Judge Easterbrook observed in his dissent, the language and history of the PDA support the conclusion reached by the Fourth and Eleventh Circuits on the applicability of the bfoq defense to a fetal protection policy. Pet. App. 76a, 82a. The PDA provides that women "affected by pregnancy" are to be treated "the same" as other employees "similar in their ability or inability to work." *See, e.g.*, S. Rep. No. 95-331, *supra*, at 4, ("[u]nder this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work."); H.R. Rep. 95-948, *supra*, at 3-4.

In this connection, it is important to remember that the company's policy applies to *all* fertile women. Many women, however, have no intention of bearing children; for example, one of the plaintiffs here was fifty years old and divorced. Such women quite reasonably may judge the exposure to lead to involve no realistic risk to future children. Similarly, other women may judge that the fetal risks due to maternal poverty are greater than the fetal risks due to lead exposure while employed. *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1229-31 (1986).

ness.[16] That court so concluded even though fertile women are obviously fully capable of performing production jobs in battery manufacturing without any harm to their fellow employees or the company's customers. Pet. App. 48a.

In sum the Court of Appeals ruling in this critical regard creates a direct circuit conflict and cannot, in any event, be squared with this Court's cases construing Title VII's bfoq provision.

C. Finally, on the one aspect of Title VII analysis on which the Court of Appeals *did* in some sense agree with the Fourth and Eleventh Circuits, all three courts have entirely departed from this Court's cases, and from the statutory language and structure.[17] That issue is whether a case in which an employer overtly discriminates between men and women in distributing job opportunities is subject only to a bfoq defense, or whether in-

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[16] The Court of Appeals' conclusion as to the "reasonably necessary" prong of the bfoq analysis also conflicts with this Court's decision in *Criswell v. Western Air Lines, supra*. *Criswell* explains that to meet that prong of the bfoq test, an employer must show *either* that "all or substantially all" employees of the proscribed group cannot perform the job safely and efficiently *or* that it is 'impossible or highly impractical' to deal with the employees on an individualized basis. 472 U.S. at 414. As Judge Easterbrook noted, in this case it is obviously *not* true that all, or substantially, all, fertile women are likely to become pregnant, or to have excessively high blood lead levels if they do become pregnant. Pet. App. 83a. Nor has the employer explained why individual monitoring of blood lead levels will not suffice, when the OSHA lead standard requires such monitoring and the company does perform such monitoring for women who were incumbents in lead-exposed positions.

[17] In fact, there are serious doctrinal differences even on this question between *Wright* and this case, on the one hand, and *Hayes*, on the other. *Wright* and this case hold that a disparate impact analysis applies if the fetal protection was in fact the employer's reason for adopting the policy. *Wright*, 697 F.2d at 1186; Pet. App. 27a-28a. *Hayes*, instead, created a presumption that such a case is one of facial discrimination, subject only to a bfoq defense, but permitted employers to rebut that presumption by demonstrating a significant risk of fetal harm mediated only through the mother. 726 F.2d at 1548.

stead such a case can be transformed—because of the employer's *motivation* in adopting the discriminatory policy—into one in which the employer is entitled to invoke a broader legitimate business justification, ordinarily available only in disparate impact cases.

Title VII, in terms, proscribes discrimination on the basis of gender *except* when certain conditions, spelled out in the statute, are satisfied; the only such condition possibly applicable here is that the employer's policy is a bona fide occupational qualification. Nothing in the statute, and no case in this Court, permits the creation of new and additional Title VII defenses that Congress did not choose to provide, or the transformation of what is plainly explicit gender-based discrimination into a facially neutral policy on the theory that the employer's *motive* is benign, or nondiscriminatory. *City of Los Angeles Department of Water v. Manhart, supra*, holds that there is no such "benign motive" defense. *Manhart* ruled that an employer's desire to create actuarial equality between men's pensions and women's pensions—a purpose that is both benign and nondiscriminatory—could not justify facially different adverse treatment of individual women. 435 U.S. at 716-717.

Indeed, the very *function* of the statutory bfoq defense is to delineate those circumstances in which the employer's reason for adopting an overtly discriminatory policy will be regarded as valid because the female employee's "very womanhood" is inconsistent with the employer's neutral job requirements. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (plaintiff's "very womanhood" is inconsistent with neutral prison employer interest in prison security). But Congress has chosen to permit such a defense only under narrow circumstances and to recognize only *certain*, narrowly-defined employer interests as sufficiently weighty to justify overt discrimination. As Judge Easterbrook observed, the courts are not entitled to alter that judgment:

> A court's belief that a good end is in view does not justify departure from the statutory framework;

it is an occasion for applying the statutory framework. . . . [*Wright* held] this *must* be a disparate impact case because the employer couldn't win it as a disparate treatment case. If the rigors of the BFOQ suggest the need for a fresh approach, that is a job for another branch. [Pet. App. 77a.]

II. Animal Studies Exclusion

In the course of its Title VII analysis, the Court of Appeals in this case held, as a matter of law, that animal studies are not the type of "solid scientific data" on which a reasonable person could reach a conclusion about the significance of toxic risks to humans. Pet. App. 34a. This sweeping holding conflicts with the longstanding view of the District of Columbia Circuit, is flatly inconsistent with the considered judgment of the medical community and of the federal agencies responsible for regulating the nation's health and safety, and disregards as well the position taken by a plurality of this Court, with no disagreement on this point by any Justice, in *Industrial Union Dept. v. American Petrol. Inst., supra.*

In *Industrial Union Dept.*, this Court invalidated an OSHA standard for benzene because the record contained insufficient evidence to support the Secretary of Labor's conclusion that benzene poses a significant risk to humans at the precise level at which the Secretary had chosen to set the standard. The plurality stated that there were a number of "rational" ways in which the Secretary could have met his burden, noting that "[i]n other proceedings, the Agency has had a good deal of data from animal experiments on which it could base a conclusion on the significance of the risk." 448 U.S. at 657 & n.64.

The District of Columbia Circuit has held as well that extrapolating the effect on humans from animal study data is eminently reasonable. For example, in *Environmental D.F. Inc. v. Environmental Pro. Agency, supra*, the EPA, acting solely on the basis of mice and rat data, suspended the registration of certain pesticides.

That court upheld the Agency's reliance on the animal data, stating that "[a]lthough extrapolation of data from mice to men may be quantitatively imprecise, it is sufficient to establish a 'substantial likelihood' that harm will result." 510 F.2d at 1299. *See also Public Citizen Health Research Group v. Tyson, supra*; *Environmental Defense Fund, Inc. v. E.P.A., supra.*

The implications for the nation's health and safety regulatory system of the Court of Appeals' categorical disqualification of animal studies cannot be overstated. Under at *least* nine federal statutes, animal studies are not only relied upon, but frequently provide the sole basis for regulation.[18] Under the Seventh Circuit's ruling, otherwise supportable regulations may now be invalidated whenever the agency relies upon animal data, regardless of the particular studies' methodological soundness; that approach would wreak havoc on the federal regulatory system.

III. Importance Of The Case

Judge Easterbrook's assessment of the importance of this case—that it is "likely the most important sex discrimination case in any court" since Title VII was enacted—is not hyperbole. First, the reach of the workplace situations that may entail some particularized risk to fetal health is quite broad:

> [P]otential [fetal hazards] in the modern workplace rang[e] from toxic chemicals in the office, to biological hazards in the hospital and laboratory, to pesticides on farms, to heavy metals such as lead, cadmium, and mercury in industry, according to a

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[18] *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136Y; Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, 348(c)(3)(A); Consumer Product Safety Act, 15 U.S.C. § 2051; Safe Drinking Water Act, 42 U.S.C. §§ 300(f) *et seq.*; Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629; Federal Water Pollution Control Act, 33 U.S.C. § 1317(a); Clean Air Act, 42 U.S.C. § 7401 et seq.; Occupational Safety and Health Act, 29 U.S.C. § 651; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*

> number of experts. In addition . . . some health professionals have suggested that radiation emitted by video display terminals, stress, and noise may be possible factors in reproductive problems. [Bureau of National Affairs, *Pregnancy and Employment* ("BNA") (1987)].[19]

While the precise number of workers exposed to such potential hazards can only be estimated, the 20 million figure relied on by Judge Easterbrook has been accepted by the EEOC, *see* 45 Fed. Reg. 7514 (1980), and, given the range of industries affected, does not seem at all out of line.[20]

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[19] *See generally* U.S. Congress, Office of Technology Assessment ("OTA"), *Reproductive Health Hazards in the Workplace*, pp. 69-126 (1985). Some of the industries in which there is substantial evidence of fetal risk include those in which women have traditionally been most heavily employed, including hospitals and childcare centers. *See BNA, supra*, at 68, 86-87; 19 Occupational Safety and Health Reporter 1223 (December 6, 1989) (between 25% and 60% of preschool children cared for in daycare centers have a virus that is harmless to them, but which, if it infects female childcare workers during the first 24 weeks of pregnancy, places the fetus at an increased risk of about 15% of permanent neurological damage). In addition, new technologies have been implicated as fetal hazards. *See* BNA, *supra*, at 82-83.

[20] For example, in the late 1970's over 1.3 million jobs in this country involved exposure to lead alone. Hricko, *Social Policy Considerations of Occupational Health Standards: the Example of Lead and Reproductive Effects*, 7 Preventive Medicine 394, 395 (1978). The Office of Technology Assessment estimates that there are a total of three million workers exposed to only two of the chemicals implicated as reproductive hazards. OTA, at 87, 90. And there are approximately 589,000 childcare workers, 97% of whom are women. U.S. Department of Labor, *Occupational Outlook Handbook* (1989) at 277; Child Care Employee Center, *National Child Care Staffing Study* (1989).

It may be that because of the need to retain an adequate workforce in the most female-intensive workplaces, employers will choose to make the workplace safe for women *and* their potential offspring, rather than to exclude fertile women because of fetal risks. But that observation simply indicates that the willingness of employers in male-dominate industries to exclude broad classes of women for fetal protection purposes reflects a subtle assumption

Second, as the scientific evidence concerning such risks develops, it appears that the number of women who have in fact been excluded from the workplace based on fetal protection concerns is tending to increase. In 1979 that number was estimated to be at least 100,000. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L. J. 641, 647 n. 30 (1981). Concern with and research on reproductive health hazards has subsequently burgeoned; indeed, the policy in this very case was instituted after 1979. More recent studies indicate, without quantifying the number of women affected, an increasing incidence of exclusionary policies in many major companies, such as General Motors, B.F. Goodrich, Allied Chemical, Chemical, Monsanto, Gulf Oil, and Sun Oil. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. at 1226.

Third, the mode of analysis employed by the Court of Appeals is likely to encourage employers to impose broad new fetal protection policies. That analysis, for one thing, would permit the exclusion not only of pregnant women, but of all fertile women, on the generally applicable theory that women may not know they are pregnant in the early weeks, and thereby may expose fetuses to hazards unknowingly. Pet. App. 53a. Further, by placing the burden of persuasion on the plaintiffs to *disprove* the significance of the risk and its mediation through women alone, that court has substantially lightened the burden upon employers seeking to justify exclusion of women on fetal protective grounds. As Judge Posner noted, this lightening of the employers' burden "may encourag[e] incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women." Pet. App. 73a.

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that women are nonessential workers, who are better excluded than accommodated.

Further, the opinion below allows employers to act based on the risks to fetuses created by the workplace alone, without taking into account the risks posed to fetuses if the mother does not have sufficient economic resources before and after pregnancy. Because the effect is to permit employers to make a basic decision of social policy, without having to give weight to all the societal factors pertinent to that decision, the net result may be a *decrease*, not an increase, in overall health of children.

Finally, the court of appeals opinion has broad implications for Title VII doctrine beyond the fetal protection area. As noted, that opinion vastly expands the concept of the bfoq defense to include broad societal concerns with little direct impact on the business itself. Moreover, the opinion below encourages other employers to come forward with "neutral" rationales for facial discrimination, thereby transforming a disparate treatment case into a disparate impact case far harder for the discrimination claimant to prosecute and prove. The effect would be fundamentally to restructure Title VII litigation as we have known it, and to weaken its protections against discrimination.

CONCLUSION

For the above-stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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89-1215

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1308

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs-Appellants,

and

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervening Plaintiff-Appellant,

v.

JOHNSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 84-C-472—Robert W. Warren, *Judge.*

ARGUED SEPTEMBER 15, 1988—
REARGUED *En Banc* JUNE 15, 1989—
DECIDED SEPTEMBER 26, 1989

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge*. Since 1982 Johnson Controls, Inc. hereinafter "Johnson Controls" or "Johnson") has maintained a fetal protection policy designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "UAW"), several UAW local unions and a group of individual employees brought suit alleging that this policy violated Title VII, 42 U.S.C. § 2000e, *et seq.*[1] The district court granted summary judgment in favor of Johnson Controls and the plaintiffs appealed. This case was originally argued before a panel of this court and the panel's opinion was circulated among all the members of the court pursuant to Circuit Rule 40(f).[2] Prior to publication of the panel opinion, a majority of the members voted to hear the case before an *en banc* court and, following rehearing *en banc*, a majority of the court voted to affirm the decision of the district court.

I.

The Battery Division of Johnson Controls, Inc., was created upon Johnson Controls' 1978 purchase of Globe

[1] More than two years later, Local 322 of the Allied Industrial Workers of America attempted to intervene under Fed. R. Civ. P. 24(a)(2). The district court denied the motion, and Local 322 has appealed. We affirm the district court's decision on the basis of the motion's untimeliness. *See Schultz v. Connery*, 863 F.2d 551, 552-55 (7th Cir. 1988).

[2] Circuit Rule 40(f) reads in pertinent part:

> "*Rehearing Sua Sponte Before Decision.* A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued . . . ."

Union, Inc. (hereinafter "Globe" or "Globe Union").[3] Globe Union was formed through the consolidation of two battery companies and had been in the battery business for almost fifty years before Johnson's purchase. Globe Union and Johnson Controls have maintained ongoing efforts to improve industrial safety through measures designed to minimize the risk lead poses to those directly involved in the manufacturing of batteries.[4]

The steps that Globe Union and Johnson Controls have taken to regulate lead exposure have not been focused merely on complying with governmental safety regulations, but originate from their longstanding corporate concern for the danger lead poses to the health and welfare of their employees, their employees' families and the general public. During the period of the 1970's when OSHA's regulation of employee exposure to lead was virtually non-existent, Johnson Controls' predecessor, Globe Union, initiated a large number of innovative programs in an attempt to control and regulate industrial lead exposure. For example, in 1969, Dr. Charles Fishburn, M.D., who later became one of the primary proponents of Johnson Controls' fetal protection policy, instituted programs for monitoring employee blood lead levels.[5] In an attempt to manage lead exposure, other safety programs

[3] Following the purchase, Globe Union operated for some two years as a wholly-owned subsidiary of Johnson Controls, after which time it became a division of Johnson Controls, Inc.

[4] In fact, the Battery Division of Johnson Controls employs fourteen people in its department that implements its corporate health and safety program that includes the fetal protection policy at issue in this case.

[5] Dr. Fishburn is a board-certified specialist in occupational medicine, maintains a private practice and also has worked as Assistant Clinical Professor at the University of Wisconsin Medical School, Department of Preventive Medicine. Since 1963, Dr. Fishburn has evaluated between 25,000 and 50,000 employees for lead exposure.

were initiated at Globe and Johnson including a lead hygiene program, respirator program, biological monitoring program, medical surveillance program and a program regulating the type, use and disposal of employee work clothing and footwear to minimize lead exposure. Globe Union also transferred employees out of high lead environments whenever a physician's medical evaluation report established that the individual had a high blood lead level. In the case of such transfers, medical removal benefits were provided to the employee before OSHA required such compensation.[6] Globe Union and Johnson Controls have continued to address their serious concern for industrial safety through efforts to design and regulate lead manufacturing areas to reduce employee lead exposure. For example, laminar flow pumps constantly supply a down draft of low velocity clean air to improve the environment of workstations where employees deal with lead. Central vacuum systems and powered floor scrubbers and sweepers are used to keep the manufacturing area as clear of lead dust as possible. Since Johnson Controls' purchase of Globe Union in 1978, it has spent approximately $15 million on environmental engineering controls at its battery division plants.

Globe Union, Johnson Controls' predecessor, established its first policy regarding fetal protection from lead exposure in 1977 as part of its comprehensive efforts to protect its employees from exposure to lead. Globe Union's announcement of the policy in a memorandum to battery plant and personnel managers stated:

> "This change [the announced policy] has come about slowly as more and more medical opinion and evidence is persuasive of the risk to the unborn, developing child.

[6] These benefits provide compensation for transfer from a position for medical reasons.

> We have stopped short of excluding women capable of bearing children from lead exposure, but do feel strongly that those women who are working in lead exposure . . . and those women who wish to be considered for employment be advised that there is risk, that we recommend *not* working in lead if they are considering a family, and further that we ask them to sign a statement that they have been advised of this risk."

(Emphasis in original). In its 1977 "Statement of Risks," Globe also observed that at that time scientific and medical evidence had not as yet conclusively established the risk lead exposure posed to the unborn. However, after noting possible risks the 1977 policy statement read:

> "We would have to say that it is, medically speaking, just good sense not to run that risk [lead exposure] if you want children and do not wish to expose the unborn child to risk, however small, and so recommend that you counsel with your family doctor and advise us of your wishes to transfer."

Johnson adopted its current fetal protection program in 1982 following its determination, based upon scientific research, that it was medically necessary to bar women from working in high lead exposure positions in the battery manufacturing division. The fetal protection policy applies to work environments in which any current employee has recorded a blood lead level exceeding 30μg/dl during the preceding year or in which the work site has yielded an air sample during the past year containing a lead level in excess of 30μg per cubic meter.[7] The policy

[7] These lead levels coincided with the Centers for Disease Control's standard in effect at that time which concluded that blood lead levels in excess of 30 μg/dl were excessive for children. (As will be noted later in this opinion, the Centers for Disease Control have since revised downward the acceptable blood lead levels for children). We note that, because of Johnson's concern for the

recites that women with childbearing capacity will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive.[8] A grandfather clause in Johnson's fetal protection policy permits fertile women who were assigned to high lead exposure positions at the time of the adoption of the policy to remain in those job assignments if they are able to maintain blood lead levels below 30 μg/dl.[9] Those employees who are removed from positions because of excessive lead levels are transferred to another job in Johnson's employ without suffering either a loss of pay or benefits.

The major reason Johnson adopted its current fetal protection policy was the inability of the previous voluntary policy to achieve the desired purpose: protecting pregnant women and their unborn children from dangerous blood lead levels. Between 1979 and 1983, at least six Johnson Controls employees in high lead exposure positions became pregnant while maintaining blood lead levels in excess of 20 micrograms. In addition, at

---

mother and the unborn baby, the lead levels Johnson established in its fetal protection policy are below the 50 μg/m3 airborne lead levels and 50 μg/100g blood lead levels permitted under OSHA's lead exposure regulations for all employees. 29 C.F.R. § 1910.1025(c)(1) and (k)(1)(i)(D). While OSHA blood lead regulations utilized the measure of ug per 100 grams and Johnson Controls' standard uses the measure of ug per deciliter, the parties have treated these measures as equivalent and we shall also treat them in this manner.

[8] The fetal protection policy defines women of childbearing capacity as: "All women except those whose inability to bear children is medically documented."

[9] Under the fetal protection policy an incumbent female employee with a blood lead level reading above 30 μg/dl is permitted a period of time to reduce her blood lead level to 30 μg/dl. If the blood level of a fertile female employee is in excess of 40 μg/dl, she is transferred at the earliest possible date. The record does not disclose the number, if any, of female employees who remain in high lead exposure positions or who were transferred as a result of the fetal protection policy.

least one of the babies born to this group of employees later recorded an elevated blood lead level. Moreover, Johnson Controls' medical consultant, Dr. Fishburn, testified as follows concerning a specific lead-related incident:

"Q: Now, let's talk in terms of prior to 1983, at any of the other Globe plants, do you have any knowledge or do you have an opinion that in any instances the exposure of the mother—or the blood-lead level of the mother while she was pregnant had an effect on the fetus and, therefore, the child?

A: [Dr. Fishburn] Well, I'm not aware of any specific instances other than the one, which was in the early 80s, about 1981.

Q: And where was that?

A: Pardon?

Q: Where was that? What plant?

A: The Globe plant?

Q: Yes.

A: It was in Owosso.

Q: Where's the Owosso plant?

A: In Owosso, Michigan.

Q: In just simple terms, what was the nature of the problem?

A: The nature of the problem was hyperactivity and control of the child. And the child had elevated blood-leads and protoporphyrinia.

Q: In your medical judgment was the problem of the child affected in any way by the exposure of the mother during pregnancy?

A: In my opinion the history of the hyperactivity and the difficulty she was having with him could

very well and probably was due to the lead that he had." [10]

In announcing its new, more defined policy, Johnson Controls emphasized its continuing interest in the protection of employees and their families from occupational health hazards and was responding to the increased understanding of the risk of lead exposure that had de-developed in the five years since it established its former voluntary policy:

> "We have over the years developed policies to protect the health of our employees whenever the nature of their duties may expose them to a health hazard and to prevent members of their families from being exposed to a health hazard because of their employment with Globe Battery Division.
>
> Medical research has shown that a woman's exposure to lead can cause ill effects on the health of her unborn child because the lead absorbed in the mother's blood as the result of this exposure can cross the placenta and mix with the child's blood. This has been acknowledged by the Occupational Safety and Health Administration.
>
> Medical research also shows that a risk to the unborn child's health is present at a much lower blood-lead level than an adult. The ill effects of the unborn child can occur during the early stage of pregnancy, before the mother is aware that she is pregnant, and can continue throughout the pregnancy.

[10] In response to questioning concerning incidents of adverse effects upon fetuses or children resulting from maternal lead exposure, Dr. Fishburn also stated that among employees at Johnson Controls' Milwaukee, Wisconsin, battery plant (covered by a contract with the AIW): "Mothers who have had children . . . have gone to the City Health Department." However, obviously because of the confidentiality of such visits, Dr. Fishburn also stated that: "I don't have the data on all of the individuals that did that."

> Because of this, it is the Division's policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.
>
> This policy is intended to reduce or eliminate the possible unhealthy effects of lead on the unborn children of pregnant employees and applicants. It does not apply to those women who have medical confirmation that they cannot bear children. However, the policy is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action."

Prior to adopting its updated fetal protection policy, Johnson seriously considered alternatives to the exclusion of women with childbearing capacity from high lead exposure positions, but after research and consultation with medical and scientific experts found itself unable to structure and implement any alternatives which would adequately protect the unborn child from the risks associated with excessive lead exposure. Johnson's experience demonstrated that the voluntary exclusion program was ineffective. To date neither Johnson nor any other battery manufacturer has been able to produce a lead free battery, or to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women. Limitation of the fetal protection policy to women actually pregnant was found ineffective because there is the very definite possibility that lead exposure will occur between conception and the time the woman discovers her pregnancy.[11] Such a limi-

[11] There will normally be some delay in diagnosis of pregnancy: "The first sign of pregnancy and the first reason most pregnant women see a physician is absence of an expected men-

tation is further inadequate because reduction of blood lead levels following removal from a lead exposure area requires a significant length of time that frequently extends well into the pregnancy term. Limitation of the policy to women planning pregnancy also was not found to be a suitable alternative because of one of the exigencies of life, the frequency of unplanned or undetected pregnancies. Permitting fertile female employees to attempt to maintain a blood lead level below 30 μg/dl or utilizing the mean or median blood lead levels of current workers as a measure of whether a woman should be permitted in a position would also not effectively protect the unborn child. The reason these actions would be inadequate is that an employee's risk of high lead levels is usually greatest immediately after commencement of work in a high lead environment.[12]

Dr. Fishburn, Johnson Controls' medical consultant, noted that Johnson and other corporations manufactur-

---

strual period. If a patient's periods are usually regular, absence of menses for 1 wk or more is presumptive evidence of pregnancy. Pregnancies are usually dated in weeks, starting from the first day of the last menstrual period. Thus, if the patient's menses were regular and if ovulation did occur on day 14 of the cycle, obstetric dates are about 2 wk longer than embryologic dates. If the patient's periods are irregular, the difference will be greater or less than 2 wk. Usually, 2 wk after missing a period the patient is considered to be six wk pregnant and the uterus is correspondingly enlarged."

R. Berkow, *The Merck Manual of Diagnosis and Therapy*, 1744-45 (14th ed. 1987). Thus, even in ideal cases, there is normally some time lag between pregnancy's onset and diagnosis. In other cases, a mother's failure to perceive a pregnancy or a delay in receiving prompt medical care can result in a pregnancy diagnosis later in pregnancy. Under a policy requiring removal only on discovery of pregnancy, the unborn child would be subject to lead exposure throughout the period prior to diagnosis of pregnancy.

[12] This conclusion was based upon Johnson's experience recounted in the testimony of Jean Beaudoin, Manager of Health, Safety and Environmental Control for the Battery Division.

ing batteries accept and routinely follow these medical policies:

"Q: Now, you testified as to what other industries had done in the past with respect to women working—women capable of bearing children working in high lead areas. Are you familiar with other companies as to their practices?

A: [Dr. Fishburn] Yes.

Q: And which companies?

A: Well, I'm familiar with a good many companies that I've worked with here in the area in foundry industry. I'm familiar with General Motors, Dow Chemical, Ford Motor Company, Owens-Corning. There's a large number of large and small companies that I'm familiar with, and where there are occupational standard programs within those companies I've exchanged the information with them.

Q: And what problems do they have in regard to this problem?

A: In regard to lead even the doctors—as I said Dr. Kehoe or Dr. Bellmap here—any doctor that has worked with lead, either in the mines as I did with Bellmap, or smelters, primary smelter we did not, and—and I was never taught to place a reproductive female in the average work exposure of lead. And furthermore, before the 60s, to my knowledge, no women were working in lead exposures. It was Kehoe's opinion at the time that any doctor that would allow this to happen was committing malpractice.

Q: Now this was—now my question was: Are you familiar with what other companies are doing now?

A: Yes.

Q: What are they doing?

A: They are restricting women from lead exposure who can have children."

In altering its fetal protection policy to more effectively protect the unborn child and its mother, Johnson responded to the most recent medical evidence which established that lead exposure *in utero* presents a substantial health risk to the unborn child, as well as its female employees, and believed that Title VII would allow it to address this risk.

II.

Proper analysis of the Title VII issues this case presents requires a thorough understanding of the following fundamental question: Does lead pose a health risk to the offspring of Johnson's female employees? In considering the evidence in the record on this subject it is important to note that *both* the UAW and Johnson Controls agree on appeal that a *substantial* health hazard to the unborn child in the womb has been established. The UAW admits in its brief that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." UAW Brief at 33. Similarly, Johnson Controls states that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22.

The record very clearly establishes that once lead is deposited in a mother's blood, it crosses the placenta and affects her unborn child. Because the fetus' blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother.[13]

[13] *See* Affidavit of J. Julian Chisholm, M.D., Director, Lead Program, J. F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine (hereinafter Dr. Chisholm Aff.) at ¶ 6 ("During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation"); Affidavit of Dr. Anthony R. Scialli, M.D., Director, Reproductive Toxicology Center (hereinafter Dr. Scialli Aff.) at ¶ 6 ("During pregnancy the mother's blood lead passes through the placenta to the fetus. Therefore, the fetus' blood lead level is approximately the same as that of the mother"). *See also* Occupational Safety and Health Administration, U.S. Department of Labor, Final Standard for Occupational Exposure to Lead: Attachments to the Preamble, 43 Fed. Reg. 54,395 (1978) ("There is conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues; lead levels in the mother's blood are comparable to concentrations of lead in the umbilical cord at birth").

It is similarly undisputed that the unborn child "is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child." Affidavit of J. Julian Chisholm, M.D. (hereinafter Dr. Chisholm Aff.) at ¶ 6.[14] *See* Affidavit of Dr. Anthony R. Scialli, M.D. (hereinafter Dr. Scialli Aff.) at ¶ 5 ("[B]ecause of the extremely rapid development of the central nervous system during gestation, the fetus may be even more sensitive to toxic effects of lead than the young child");[15] Affidavit of M. Donald Whorton, M.D. (hereinafter Dr. Whorton Aff.), at ¶ 8 ("[Recent medical studies] suggest that even relatively low levels of lead exposure to the fetus can cause damage to the higher brain function resulting in decreased neurobehavioral development in the child");[16] Deposition of Marvin S. Legator, Ph.D. (hereinafter Dr. Legator Dep.) at 49 (UAW witness) ("There is no question about the sensitivity of the fetus. . . . I don't think one could argue about the fact that lead affects the fetus");[17] Deposition of Ellen Silbergeld, Ph.D. (hereinafter Dr. Silbergeld Dep.) at 21-23 (UAW witness) (Noting that in the area

[14] Director, Lead Program, John F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine.

[15] Director, Reproductive Toxicology Center.

[16] Senior Occupational Physician Epidemiologist, Environmental Health Associates, Inc., Oakland, California.

[17] Professor and Director of the Division of Environmental Toxicology, University of Texas Medical Branch.

of central nervous system impairment a young child is probably more sensitive than an adult and that the consequences for the young child and the fetus are similar).[18] The Centers for Disease Control summarized these basic facts in a document questioning the efficacy of current OSHA standards in protecting the unborn child and implying that an unborn child is adversely affected by lead levels lower than 30 μg/dl reflected in Johnson Control's fetal protection policy:

> "In a pregnant woman, lead crosses the placenta and lead concentrations in umbilical cord blood are nearly equal to those in maternal blood. *Since the growing brain of the fetus is likely to be at least as sensitive to the neurologic balance of lead as the brain of a young child, umbilical cord blood levels should be at least below 25 μg/dl.* Therefore, the OSHA standard is probably not sufficiently strict to protect the fetus. Further study is needed to define acceptable lead levels among women of childbearing age.
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> • • • •
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> "Ideally, engineering features should prevent workers from being exposed to lead dust and vapors. When workers are exposed, compliance with Occupational Safety and Health Administration (OSHA) regulations appears to be effective in preventing them from transporting lead home to children. . . . *The prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*" [19]

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[18] Senior Scientist, Toxic Program, Environmental Defense Fund.

[19] Centers for Disease Control, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* 7, 20, 21 (1985) (emphasis added). In this same document the Centers for Disease Control announced that based upon "current knowledge concerning screening, diagnosis, treatment, followup, and environmental intervention for children with elevated blood lead

The chief reason why an unborn child's lead exposure is of such great concern is that it has been medically established that lead attacks the fetus' central nervous system and retards cognitive development. *See* Dr. Chisholm Aff. at ¶ 6 ("[H]arm [to the fetus] includes . . . retarded cognitive development which may result in learning deficiencies and behavioral disorders"); Dr. Scialli Aff. at ¶ 7 ("The potential damage to the central nervous system of the fetus from lead exposure includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities. It is my medical opinion that such damage may be permanent"); Dr. Whorton Aff. at ¶ 8 ("[Recent medical studies] suggest that even relatively low levels of lead exposure to the fetus can cause damage to the higher brain function resulting in decreased neuro-behavioral development in the child"); Affidavit of Dr. Paul B. Hamon, Ph.D., Professor, Environmental Health, University of Cincinnati (hereinafter Dr. Hammond Aff.) at ¶ 3 ("[As] the director of a study that is currently being conducted in Cincinnati on the health effects of lead exposure on children . . . [we] analyze[] the subsequent mental development of children who have been exposed to lead both in utero and postnatally. The initial results of this ongoing study . . . establish that exposure of the fetus to maternal blood levels in excess of 12 micrograms per deciliter of whole blood creates a significant risk of low birth weight and a clear decrement in the subsequent mental development of the infant"); Dr. Silbergeld Dep. at 64 (Describing studies of child exposure to lead, in which she participated, which are "highly consistent with reports of hyperactivity, decreased attention span, learning problems which have been described in [lead exposed] children"), and at 49-50 (Reporting that studies of prenatal lead

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levels," it was lowering its definition of an elevated blood lead level from 30 to 25 μg/dl. *Id.* at 1. Elevated blood level, according to the CDC, "reflects excessive absorption of lead." *Id.*

exposure in which she participated found similar effects to post-natal lead exposure. These effects are "substantial irreversible cellular and functional damage to the brain").[20]

Unlike physical birth defects, such as those associated with thalidomide,[21] lead's sometimes subtle damaging effects may not fully manifest themselves until the child is diagnosed as having learning problems in a school setting some five to six years after birth:

> "What we are worried about are very subtle things, the ability to really affect learning ability. And so far as impairing the child's progress, they really aren't evident until he gets into school. He discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child perhaps toward the end of the first grade, particularly in the second grade."

Deposition of Dr. J. Julian Chisholm, Jr., M.D., Director, Lead Program, John F. Kennedy Institute and Associate Professor of Pediatrics, Johns Hopkins School of Medicine (hereinafter Chisholm Dep.), at 27.

Probably the worst aspect of lead's influence upon an unborn child's future intellectual development is that its

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[20] Indeed, as noted in section I, *supra*, Johnson Controls experienced an incident of hyperactivity in a child of a woman in the work force of its Owosso, Michigan, battery plant.

[21] Thalidomide is "[a] sedative and hypnotic [drug] commonly used in Europe in the late 1950's and early 1960's. Its use was discontinued because it was discovered to cause serious congenital anomalies in the fetus, notably amelia [absence of limbs] and phocomelia [absence of the proximal portion of a limb], when taken by a woman during early pregnancy." *Dorland's Illustrated Medical Dictionary* 1353 (26th ed. 1981).

effects have frequently been found to be irreversible.[22] Further, the most recent research suggests that the unborn child may be affected at lead levels previously believed safe. *See* J.M. Davis & D. Svendsgaard, *Lead and Child Development*, 329 Nature 297 (1987) (Collecting results of recent studies in this area).

Lead exposure can also pose other physical threats to the unborn child such as reduction of the infant's birth weight, premature delivery, and stillbirth. *See* Dr. Chisholm Aff. ¶ 6. Lead may also affect the other vital fetal organs including, but not limited to, the liver and kidneys.[23]

The danger resulting from lead exposure cannot simply be avoided through removing a pregnant woman from lead exposure promptly after the discovery of pregnancy. Dr. Chisholm, a recognized expert in the research field of treatment and prevention of lead poisoning in young children, observed that "excluding only women who are actually pregnant from work areas where there are elevated blood lead levels would not sufficiently protect the health and safety of the unborn child." Dr. Chisholm Aff. at ¶ 10. This is true because *lead continues to exert an effect upon the mother and her unborn child for a sig-*

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[22] *See* Dr. Chisholm Aff. at ¶ 6 ("Medical studies released in the last year or two . . . suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents grave risk of permanent harm to the central nervous system of the fetus"); Dr. Scialli Aff. at ¶ 7 ("It is my medical opinion that [the damage lead causes to the fetus' central nervous system] may be permanent"); Dr. Silbergeld Dep. at 49-50 (Reporting that studies of prenatal lead exposure in which she participated found similar effects to post-natal lead exposure. These effects are "substantial irreversible cellular and functional damage to the brain").

[23] *See* Dr. Silbergeld Dep. at 50-52. Early in pregnancy, lead's effect upon the mother's secretion of the hormone progesterone can prevent implantation of the fertilized ovum, resulting in the loss of pregnancy. *See* Dr. Chisholm Dep. at 33.

nificant period of time after she has been removed from lead exposure. Dr. Chisholm's uncontroverted affidavit explained:

> "[S]ubstantial medical evidence . . . establishes that lead remains in the body for a significant period of time after removal from a high lead environment. Lead builds up not only in the blood and soft tissues, but is also stored in the bones. Following removal from the high lead environment, as the lead built up in the blood and soft tissues leaves the body, the lead in the bone begins to turnover, thus maintaining high blood lead levels even long after removal. As a general rule of thumb, it takes approximately two or three times as long for the blood leads to decrease as it did for such blood levels to increase. Therefore, if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered."

Dr. Chisholm Aff. at ¶ 10. *See also* Whorton, *supra* note 16, at 8 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant blood lead burden would pose a potential hazard to any conceptus *for many years after exposure*"); Dr. Silbergeld Dep. at 27-28 ("For all purposes there is continuing exposure to lead even after removal from sources of lead . . . . If it were possible to take a person into a lead-free environment after an episode of exposure, the turnover of lead is probably on the order of 100 days. So *within a year or so* there would be a reduction in lead. There is also, of course, a rapid removal of lead from the blood into the bones [and] soft tissue that is no longer available for circulation. But considering that most people are not removed to lead-free environments, even if they go from areas of relatively high exposure to lower exposures,

there is continuing cyclic . . . exposure to lead" (emphasis added). Furthermore, because lead is stored in the mother's bones, and "because the bones may decalcify during pregnancy in order to provide the fetus with calcium, there may be an additional danger of transfer of stored lead to the fetus." Dr. Chisholm Aff. at ¶ 10. *See also* Whorton, *supra* note 16, at 7-8 ("[Dr. W.] Manton [in a 1985 edition of the British Journal of Industrial Medicine] reported on a longitudinal study of blood lead levels in a woman before, during and after pregnancy. He reported a doubling of pre-pregnancy blood levels during pregnancy and suggest[ed] mobilization of lead from bone during pregnancy as the mechanism") (footnote omitted). These conclusions are consistent with research that OSHA relied upon and quoted in establishing its 1978 lead standard:

> "The placenta also has considerable storage capacity, and during the first few months of pregnancy, it grows tremendously in size while the fetus remains relatively small. Calcium along with other substances is stored in the placenta to be used in the later months of pregnancy for growth by the fetus. It could be expected that lead would be similarly stored."

Occupational Health and Safety Administration, U.S. Department of Labor, Final Standard for Occupational Exposure to Lead: Attachments to Preamble, 43 Fed. Reg. 54,395 (1978) (quoting study of Dr. Vilma Hunt, Associate Professor of Environmental Health, Pennsylvania University, contained in OSHA's record).[24]

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[24] OSHA went on to observe that

> "Dr. Hunt would not exclude the potential for lead-induced effects on the initial trimester of pregnancy. She maintains that the presence of lead in fetal tissue does not necessarily indicate that the observed effects occurred during the second and third trimester; they may, in fact, be the result of earlier accumulations of lead in the first trimester of pregnancy. . . . [T]he

The overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm. This evidence clearly approaches a "general consensus within the scientific community," and certainly "suffices to show that within that community there is [a] considerable body of opinion that significant risk exists to the unborn child from exposure to lead." *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 (4th Cir. 1982). Next we consider the proper legal standards to be applied when employees bring a Title VII sex discrimination action challenging an employer's response to this serious health risk.

III.

Having considered both the nature of the risk of harm that lead exposure presents to the unborn child and the mother and the policies Johnson implemented in response to this problem, we now turn to the question of the proper legal analysis to be applied to Johnson's fetal protection program under Title VII. The question presented is should we follow the lead of the Fourth Circuit, the Eleventh Circuit and the EEOC in determining that these policies can be justified with a "business necessity" defense or must we conclude that these policies may only be justified with a bona fide occupational qualification defense.

In approaching this issue we are cognizant of the mandates the United States Supreme Court has recited on two occasions concerning the necessity of avoiding rigid

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> fetus [can be] directly affected by lead which is absorbed during the first trimester of pregnancy. As the placenta is maturing, and the placental barrier is thinning, it is storing calcium necessary for later fetal skeletal production. Concomitant with the first evidence of fetal skeletal calcification, lead is observed present in the fetus. Like calcium, lead may be stored in the placenta during the early stages of pregnancy to be released when the placenta becomes functional."

Id. (citations omitted).

application of proof patterns to particular factual situations. The Court's concern was first set forth in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978), where the Court noted that the formula it had devised for demonstrating a prima facie case of disparate treatment in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) "was not intended to be an inflexible rule." The Court expanded on this same subject in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977), when it observed:

> "Our decision in [*McDonnell Douglas*] did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." [*McDonnell Douglas*, 411 U.S. at 802 n.13]."

(Footnote omitted). The thrust of these repeated Supreme Court pronouncements is that courts are required to avoid inflexible application of judicially devised proof patterns in cases that present factual circumstances different from those encountered previously. *See also Wright v. Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982). Any proof scheme a federal court applies is useful only if it assists the court in properly identifying the employment practices Congress intended to prohibit under Title VII. These concerns are particularly important in a case of this nature where the interest in financial reward is balanced against a medically established risk of the birth of a medically or physically deprived baby and where the challenged distinction is based upon the reality that only the female of the human species is capable of childbearing.

Two other federal courts of appeals and the Equal Employment Opportunity Commission have addressed the

question of the defenses available to an employer under Title VII in a case challenging a fetal protection program. The first court of appeals to address this question was the Fourth Circuit in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). That case involved a fetal protection program very similar to the one Johnson instituted, in that it forbade any fertile woman from working in a job which "'may require contact with and exposure to known or suspected abortifacient or teratogenic agents.'" *Olin*, 697 F.2d at 1182. In considering which of several possible theories of claim and defense should apply in a Title VII analysis of a fetal protection policy, the Fourth Circuit observed:

> "We must start by conceding that the fact situation [the fetal protection policy] presents does not fit with absolute precision into any of the developed theories. It differs in some respects—either in its claim or defense elements—from each of the paradigmatic fact situations with which the different theories have been centrally concerned. This of course accounts for the conflict on the point between the parties.
>
> "That there would be such fact situations in Title VII litigation has always been recognized by the Supreme Court as it has developed and applied the different theories. *The Court has continually admonished, and indeed demonstrated in its own decisions, that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that would emerge in Title VII litigation.* So has this court."

697 F.2d at 1184 (emphasis added, footnotes omitted).

The court applied the disparate impact business necessity theory of claim and defense that normally is applied only in cases in which an employer's policy is "facially neutral." Even though the court recognized that the facial neutrality of a fetal protection policy "might be subject

to logical dispute, the dispute would involve mere semantic quibbling having no relevance to the underlying principle that gave rise to this theory." 697 F.2d at 1186. Because a fetal protection policy involves motivations and consequences most closely resembling a disparate impact case, the Fourth Circuit felt it should be analyzed under the disparate impact business necessity theory. *See id.* The Fourth Circuit defined the business necessity defense in the context of a fetal protection policy as requiring a demonstration that "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, that fertile women workers though not men workers, be appropriately restricted from exposure to those hazards . . . ." 697 F.2d at 1190 (footnote omitted). However, the Fourth Circuit permitted this evidentiary demonstration to be rebutted with proof that "there are 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [or protect against the risk of harm], or accomplish it equally well with a lesser differential . . . impact [between women and men workers].'" [25]

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[25] *Id.* at 1191 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)). Johnson Controls' primary interest in this case is protecting the development and health of female employees and their unborn children. In construing the business necessity defense the Fourth Circuit in *Olin* cogently observed:

> "We do not think that a general basis for the 'business necessity' asserted here need be sought in other considerations than the general societal interest—reflected in many national laws imposing legal obligations upon business enterprises—and having those enterprises operate in ways protective of the health of workers and their families, consumers, and environmental neighbors.
>
> For this reason it is irrelevant that, as claimants point out, the mere purpose to avoid potential liability and consequent economic loss may not suffice, standing alone, to establish a

The Eleventh Circuit utilized a similar analysis in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) (Tuttle, J.). In *Hayes* a hospital terminated a pregnant woman's employment upon discovering her pregnancy. In *Hayes* the Court utilized the elements of the business necessity defense found in *Olin* to establish that the involved policy was not "facially discriminatory." The Eleventh Circuit stated: "In other words, the employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men." 726 F.2d at 1548 (footnote omitted). The theory underlying the facial neutrality analysis utilized in *Hayes* is that a policy meeting the above criteria "is neutral in the sense that it effectively and equally protects the offspring of all employees." 726 F.2d at 1548. If facial neutrality is established, the court proceeds to a disparate impact business necessity analysis. 726 F.2d at 1552. Under the Eleventh Circuit's analysis, if facial neutrality is not established, the employer must present a bona fide occupational qualification defense to justify its fetal protection policy.

The Eleventh Circuit went on to set out the disparate impast business necessity analysis it would apply in cases where facial neutrality was established. The court recognized that a fetal protection policy, even if "facially neutral," "clearly has a disproportionate impact on women

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business necessity defense. *See Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978)."

697 F.2d at 1190 n.26.

Although costs from tort judgments are merely a secondary consideration, they are still an important and legitimate additional consideration for an employer when lead safety policies may very well affect the development of the child in its most critical stage in the mother's womb.

since only they are affected by it." *Id.* However, "the employer's business necessity defense applies automatically, just as the employee's prima facie case of disparate impact applies automatically. That is because to reach the disparate impact stage of analysis in a fetal protection case, the employer has *already proved*—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men." *Id.* at 1553. As in *Olin*, "the employer's business necessity defense may be rebuttted by proof that there are acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with less adverse impact on one sex." *Id.*

Although *Olin* and *Hayes* present somewhat different analyses, both cases, in essence, determine that a business necessity defense in a fetal protection policy case requires (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. Both cases also allow the employee to present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn.

On October 3, 1988, the Equal Employment Opportunity Commission, the agency responsible for the administration of Title VII, issued a *Policy Statement on Reproductive and Fetal Hazards Under Title VII* that, in substance, endorsed the approaches that the Fourth and Eleventh Circuits have taken to fetal protection cases. Equal Employment Opportunity Commission, *Policy Statement on Reproductive and Fetal Hazards Under Title VII* (October 3, 1988) (found in Fair Empl. Prac. Manual (BNA) 401.6013). As the Supreme Court has recognized, while such EEOC pronouncements "do not have the force of law, . . . still they ' "constitute a body of experienced and informed judgment to which courts and litigants may

resort for guidance." '" *Local No. 93, International Association of Fire Fighters v. City of Cleveland*, 478 U.S. 501, 518 (1988) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) which quoted, in turn, *Skidmore v. Swift & Co.*, 223 U.S. 134, 140 (1944)). A fair reading of the EEOC's Policy Statement reflects that the EEOC thoroughly considered the various interests under Title VII and followed earlier judicial decisions only after concluding that these decisions properly implemented Title VII policies. The EEOC noted that fetal protection "*cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves.*" *Policy Statement* (found in Fair Empl. Prac. Manual (BNA) 401:6013, 6015 n.11) emphasis added). The EEOC then candidly recognized that fetal protection policies that "exclude only women constitute *per se* violations of the Act." *Id.* at 401:6014 (footnote omitted). However, the EEOC went on to observe that

> "[a]lthough the BFOQ defense is normally the only one available in cases of overt discrimination, *the Commission follows the lead of every court of appeals to have addressed the question [in determining] that the business necessity defense applies to these cases. While business necessity has traditionally been limited to disparate impact casts, there is an argument that in this narrow class of cases the defense should be flexibly applied.*"

Id. at 401:6014-15 (emphasis added, footnote omitted). The EEOC concluded that:

> "The issues [in a fetal protection policy case to which the business necessity defense is applicable] are (1) whether there exists a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive hazard in the workplace; (2) whether the harm to employees' offspring takes place through the exposure of employees of one sex but not employees of the opposite sex; and (3) whether the employer's policy effectively eliminates the risk of fetal or reproductive harm. Even if these elements are proved, the policy will not withstand scrutiny [if] it is shown that there exists a reasonable alternative policy that will protect employees' offspring from fetal or reproductive harm and that has a less discriminatory impact on employees of the restricted sex. Thus, an employer's reproductive or fetal protection policy must be neutrally designed to protect all employees' offspring from hazards existing in the workplace. Where substantial evidence exists that the risk of harm to employees' offspring takes place only in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards."

Id. at 401:6015-16 (footnotes omitted).

We agree with the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case. It is interesting to note that neither the text of Title VII nor Supreme Court pronouncements mandate a holding that all forms of facial discrimination are justifiable only with a bona fide occupational qualification defense. *See Olin*, 697 F.2d at 1186 n.21 ("While the loose equation—overt discrimination only B.F.O.Q. defense —is . . . properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine"). *See also Scherr v. Woodland School Community Consolidated District, No. 50*, 867 F.2d 974, 977-81 (7th Cir. 1988) (Permitting business necessity defense to be utilized under Pregnancy Discrimination Act).

We are convinced that the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests

of the employer, the employee and the unborn child in a manner consistent with Title VII. The requirement of a substantial health risk to the unborn child effectively distinguishes between the legitimate risk of harm to health and safety which Title VII permits employers to consider and the "[m]yths of purely habitual assumptions" [26] that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities. Likewise, the requirement that the risk of harm to offspring be substantially confined to female employees means that a fetal protection policy applying only to women recognizes the basic physical fact of human reproduction, that only women are capable of bearing children. Finally, the employee's option of presenting less discriminatory alternatives to a fetal protection policy assures that these policies are only as restrictive as necessary to prevent the serious risk of harm to the unborn child. Accordingly, we agree with the Fourth Circuit, Eleventh Circuit and EEOC that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII. We now proceed to determine whether this defense can be utilized to sustain Johnson Controls' fetal protection policy.

IV.

In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2125-26 (1989), the Supreme Court recently described the general policies underlying the business necessity defense that we utilize in considering Johnson Control's fetal protection policy:

> "Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of . . . a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate

[26] *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

> employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils. . . ."

(Citations omitted).

In *Wards Cove* the Court also clarified the proof burdens to be applied in addressing an employer's business necessity defense:

> "[T]he employer carries the burden of producing evidence of a business justification for his employment practice. *The burden of persuasion, however, remains with the disparate-impact plaintiff.* To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, or in the panel's decision on remand—suggesting that the persuasion burden should shift to the [defendants] once the [plaintiffs] establish a prima facie case of disparate impact—its decisions were erroneous. '[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times.*' *Watson [v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2790 (1988)] (O'Connor, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, and more specifically, it conforms to the rule in disparate treatment cases that the

> plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employers' (sic) 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden. The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity. See 42 U.S.C. § 2000e-2(a)."

Wards Cove, 109 S. Ct. at 2126 (citations omitted, emphasis added).

The allocation of the burden of proof under substantive Title VII law outlined in *Wards Cove* plays a significant role in summary judgment proceedings of this nature. We have previously recognized that: "Summary judgment is properly entered in favor of a party when the opposing party is unable to make a showing sufficient to prove an essential element of a case on which the opposing party bears the burden of proof." *Common v. Williams*, 859 F.2d 467, 469 (7th Cir. 1988). The Supreme Court explained the reasons for this rule in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986):

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden the proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,'

> since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is not 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). Thus, the question we must address is whether the UAW, which bears the burden of persuasion, has presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported.

Our inquiry must be based on the underlying premise that the creation of a record adequate to meet legal challenges is the responsibility of the parties litigating the case. We may neither add nor subtract from the record; we must accept it as it is. Thus, "[w]hen confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue, may not rest on its pleadings, but must affirmatively demonstrate by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County, REMC*, 840 F.2d 405, 410 (7th Cir. 1988) (emphasis in original). As we have also noted: "A district court need not scour the record to make the case of a party who does nothing. . . . [C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course." *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989). We now

turn to whether the UAW has established a genuine issue of material fact concerning any of the elements of the business necessity defense upon which it bears the burden of persuasion.

A. *Substantial Risk of Harm to the Unborn Child*

Both the UAW and Johnson Controls agree on appeal that the significant evidence of risks to the health of the fetus contained in the record establishes a *substantial* health risk to the unborn child. The UAW in its brief admits that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." UAW Brief at 33. Similarly, Johnson states that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22. In light of the parties' agreement on the question of substantial risk of harm to the unborn child, this issue is not before this court on appeal.

Although the parties do not contest this question on appeal, the evidence in the record that we recounted in Section II, *supra*, conclusively supports the accepted medical and scientific finding that lead creates a substantial risk of harm to unborn children. In order to present the risk of harm necessary to sustain a fetal protection policy "it is not necessary to prove the existence of a general consensus on the [question of risk of harm to the unborn child] within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one." *Olin*, 697 F.2d at 1191. The overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure, found in the record and set forth in Section II, *supra*, approaches a "general consensus within the qualified scientific community," and certainly "suffices to show that

within that community there is [a] considerable body of opinion that significant risk exists." [27] Accordingly, we are convinced that there is no genuine issue of material fact with respect to this component of Johnson Controls' business necessity defense.[28]

B. *Exposure Through a Single Sex*

The UAW's efforts in this case have primarily been devoted toward negating the second element of Johnson's business necessity defense, that the risk of transmission of potentially harmful lead exposure to unborn children is substantially confined to fertile female employees. On this issue, as with the question of substantial risk of harm to the unborn child, "it is not necessary to prove the existence of a general consensus on the [issue] within the qualified scientific community." *Olin*, 697 F.2d at 1191.

In this case Johnson Controls' experts, without exception, testified that a male worker's exposure to lead at levels within the 50 μg dl maximum set forth in OSHA's current (1978) lead exposure guidelines did not pose a substantial risk of genetically transmitted harm from the male to the unborn child. Moreover, Johnson's experts took the position that because this data dealt exclusively with animals, the results of these studies were not scientifically established as being applicable to humans. In contrast, the UAW witnesses posited that animal studies had

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[27] *Olin*, 697 F.2d at 1191.

[28] There might be a suggestion that the unborn child would be harmed if his or her mother were deprived of insurance benefits or wages that could be utilized for prenatal care as a result of the application of Johnson Controls' fetal protection policy. This issue bears no relevance to Johnson Controls' employment practices for any female employees deprived of jobs in high lead environments under Johnson's fetal protection policy, instituted in 1982, are transferred to other positions in Johnson Controls' employ without *any* loss of either wages benefits.

demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure. The UAW witnesses attempt to bridge the wide chasm between the results of animal studies and a conclusion of genetic harm allegedly transmitted through the male human being with human studies merely establishing a correlation between male lead exposure and changes in sperm shape. It is interesting to note that the UAW has not presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure. It is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems.[29]

As noted previously, when the Title VII disparate impact business necessity proof scheme is applied at the summary judgment phase of litigation, the UAW is required to present facts sufficient for the trier of fact to conclude that transmission of the significant risk of harm lead presents to the unborn child is not substantially confined to female employees. Unlike the recorded evidence of a substantial risk of harm resulting to an unborn child from exposure to lead through the mother's blood stream and placenta, the evidence of risk to the unborn child resulting from exposure of the father to the lead levels currently present in Johnson Controls' battery manufacturing factories is, at best, speculative and unconvincing. The UAW's animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead. The facts the UAW posits do not negate the conclusion that the harm lead

[29] See Dr. Scialli Aff. at ¶ 9, Dr. Hammond Aff. at ¶ 7, Dr. Chisholm Dep. at 30-32.

exposure causes to the unborn child is "substantially confined to female employees."[30] Accordingly, we are convinced that the UAW has failed to present facts sufficient to carry its burden of demonstrating the absence of the second element of Johnson Controls' business necessity defense, application of the risk of transmitting lead exposure to unborn children only through females.

This recognition of the physical differences between the human sexes creates a distinction between men and women that accords with our previous recognition that Title VII permits distinctions based upon the real sex-based differences between men and women, especially those related to child birth. As we observed in *Torres v. Wisconsin Dept. of Health and Human Social Services*, 859 F.2d 1523, 1527-28 (7th Cir. 1988) (en banc):

> "'Myths and purely habitual assumptions about a woman's (or a man's) inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.' *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978). On the other hand, there are real as well as fictional differences between men and women. *Id.* *For instance, the Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, childbirth, or sexuality. See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) ("[T]his *Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.*"); *id.* at 481 (Blackmun, J., concurring) ("The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really

[30] Slip, 657 F.2d at 1191.

exist.') *See generally Parham v. Hughes*, 441 U.S. 347, 354 (1979) (opinion of Stewart, J.) ('In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.'); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) ('The different treatment of men and women . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.' (emphasis in original)). This same principle has been recognized in the Title VII area. *See, e.g., Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), *vacated because of mootness*, 671 F.2d 1100 (8th Cir. 1982) (recognizing the need to have female registered nurses care for obstetrical patients); *see also* I A. Larson & L. Larson, *Employment Discrimination—Sex* § 14.30 (1987) ('[G]iving respect to deep-seated feelings of personal privacy involving one's own genital area is quite a different matter from catering to the desire of some male airline passengers to have . . . an attractive stewardess.')"

Because scientific data available as of this date reflects that the risk of transmission of harm to unborn children is confined to fertile female employees, the sex-based distinction present in Johnson Controls' fetal protection policy is based upon real physical differences between men and women relating to childbearing capacity and is consistent with Title VII.

C. *Adequate But Less Discriminatory Alternatives*

We are cognizant of the fact that Johnson's fetal protection policy might very well not have been sustainable had the UAW presented facts and reasoning sufficient for the trier of fact to conclude that "there are 'acceptable

alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish equally well with a lesser differential . . . impact [between women and men workers].'" *Olin*, 697 F.2d at 1191 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)).

As an initial matter, we must determine whether the UAW has preserved this issue for appeal. The UAW's brief explicitly admits that "the plaintiffs did not respond to the defendant's allegations that it had considered a number of alternatives [to its fetal protection policy]," UAW Brief at 37 n.14, and fails to present any of its own alternatives. Federal Rule of Appellate Procedure 28(a)(4) provides, in relevant part, that: "The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . . (4) an argument. . . . The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." In *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988), we observed that:

> "We have said that an appellant is required by Rule 28(a)(4) of the Federal Rules of Appellate Procedure to present in his brief to the appellate court the issues that he desires to litigate and to support his arguments on those issues with appropriate judicial authority. *See Beard v. Whitley County REMC*, 840 F.2d 405, 408 (7th Cir. 1988). '"It is not the obligation of this court to research and construct the legal arguments open to parties especially when they are represented by counsel."' *Id.* at 408-09 (quoting *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056, 107 S. Ct. 933, 93 L.Ed.2d 984 1987)). Mr. Zelazny's conclusory remarks about his lack of diligence without any further argument on the issue and

> without any attempt to offer a justification for his delay do not comply with the strictures of Rule 28 (a) (4). Therefore, even if Mr. Zelazny disputes the district court's determination of inexcusable delay, he has waived any argument on that issue."

The UAW's failure to specifically articulate a less discriminatory alternative argument in the manner required in Federal Rule of Appellate Procedure 28(a) (4) means that it has failed to adequately present this issue to this court.

Even were we to conclude that the UAW had preserved this issue for appeal, we would be constrained to hold that the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126-27 (1989), the Supreme Court recently explained the burden a Title VII plaintiff must carry in order to establish that an employer's policy is invalid on the basis of the availability of less discriminatory alternatives:

> "[I]f . . . [plaintiffs] cannot persuade the trier of fact on the question of [the employer's] business necessity defense, [plaintiffs] may still be able to prevail. To do so, [plaintiffs] will have to persuade the fact finder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];' by so demonstrating, [plaintiffs] would prove that '[the employers were] using [their] test merely as a "pretext" for discrimination.' *Albemarle Paper Co.* [*v. Moody*], 422 U.S. 405, 425 (1975)]; *see also Watson*, 487 U.S. at —— (O'Connor, J.); *Id.*, at —— (Blackmun, J.). If [plaintiffs], having established a prima facie case, come forward with alternatives to

> [the employers'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [the employers] refuse to adopt these alternatives, such a refusal would belie a claim by [plaintiffs] that their incumbent practices are being employed for nondiscriminatory reasons.
>
> Of course, any alternative practices which [plaintiffs] offer up in this respect must be equally effective as [the employers'] chosen hiring procedures in achieving [the employers'] legitimate employment goals. Moreover, '[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practices in serving the employer's legitimate business goals.' *Watson* [*v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (1988)] (O'Connor, J.). 'Courts are generally less competent than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring process in response to a Title VII suit."

The above passage from *Wards Cove* makes clear (1) that the UAW bears the burden of presenting specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also bears the burden of demonstrating that its proposed alternative policy is "*equally* effective [as Johnson Controls' fetal protection policy] in achieving [Johnson's] legitimate employment goals," *Wards Cove*, 109 S. Ct. at 2127 (emphasis added); and (3) that this inquiry is to be undertaken with the recognition that "'[f]actors such as the cost or other burdens of proposed alternative selection devises are relevant in determining whether they would be

equally as effective as the challenged practices in serving the employer's legitimate business goals,'" *Id.* at 2127 (quoting *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (19883 (O'Connor, J.)), and that "'[c]ourts are generally less competent than employers to restructure business practices' . . . ." *Id.* (quoting *Furnco Construction Corp.*, 438 U.S. at 578). In our case the inquiry is terminated at the first stage. The UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy, much less a demonstration of how any particular economically and technologically feasible alternative would effectively achieve Johnson's purpose of preventing the risk of fetal harm associated with the exposure to lead of fertile female employees.

The record also demonstrates that viable alternatives to the fetal protection program were not presented to the court that would equally effectively further Johnson's legitimate interests. As detailed in Section I, *supra*, Johnson Controls itself considered various possible less discriminatory alternatives prior to its adoption of the current fetal protection policy in 1982. In considering these alternatives, Johnson realized that lead could not be eliminated as a battery component. Furthermore, technically and economically feasible alternatives in the manufacturing process are incapable of reducing lead exposure to acceptable levels for pregnant women.[31] Limitation of

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[31] *Cf. Sable Communications v. FCC*, 109 S. Ct. 2829, 2837-39 (1989). This was a First Amendment challenge to federal legislation outlawing dial-a-porn telephone services. In passing upon the constitutionality of this proscription, the Supreme Court observed that: "For all we know from the record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages." *Sable*, 109 S. Ct. at 2838. Thus, the Court concluded that "the congressional record contains no legislative findings that would justify us in concluding that there is no

the exclusion from high lead positions to women actually pregnant or planning pregnancy was inadequate because lead exposure frequently takes place during the time period before the woman or her doctor determine her pregnancy. In addition, reduction of blood lead levels following removal of a significant period of time that can extend well into the pregnancy term. Although the Supreme Court has noted that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster"[32] under the business necessity defense, Johnson's policy could well have met this exacting standard.

Finally, in resolving this issue we must act with an awareness of the Supreme Court's warnings that "'[c]ourts are generally less competent than employers to restructure business practices,'"[33] and that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's [proposed alternative employment policy] in response to a Title VII suit."[34] In light of these policies, the UAW has not met its evidentiary burden at the summary judgment phase of presenting facts from which a trier of fact could determine that an alternative policy would be equally as effective as Johnson Controls' fetal protection policy in preventing risk of harm to unborn children from lead exposure.

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constitutionally less restrictive means, short of a total ban, to achieve the government's interest in protecting minors." *Id.* In contrast, our case involves uncontroverted scientific and medical data supporting determinations that available technology would not adequately prevent hazards accompanying lead exposure. *Sable* is considered in more detail in Section V, *infra*.

[32] *Wards Cove*, 109 S. Ct. at 2126.

[33] *Wards Cove*, 109 S. Ct. at 2127 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. at 578).

[34] *Wards Cove*, 109 S. Ct. at 2127.

V.

Having just held that the business necessity defense shields an employer from liability for sex discrimination under Title VII in a fetal protection policy involving the type of facts present herein, we are also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense.

In addressing the bona fide occupational qualification question, we have observed that: "It is universally recognized that this exception to Title VII was 'meant to be an extremely narrow exception to the general prohibition of discrimination. . . .'" *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1527 (7th Cir. 1988) (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)). Nonetheless, this formulation should not be treated as inviting a black letter conclusion that the employer automatically loses in a case in which it is required to demonstrate a bona fide occupational qualification. The bona fide occupational qualification defense, like other Title VII defenses, must be construed in a manner which gives meaningful and thoughtful consideration to the *interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child.* Indeed, the fact that Johnson's fetal protection policy applies exclusively to the high lead exposure areas of its battery division demonstrates why the policy is drafted with sufficiently definite terminology as to constitute a "narrow exception to the general prohibition of discrimination . . . ."[35]

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[35] *Torres*, 859 F.2d at 1527 (quoting *Dothard*, 433 U.S. at 334). The battery division is only a small segment of Johnson Controls' entire business operation. Johnson Controls employs 25,700 employees, only 425 of whom work in its battery division. *See* Dan's Marketing Services, Inc., 1 *America's Corporate Families* 694 (1988).

In the context of the Pregnancy Discrimination Act,[36] application of the bona fide occupational qualification defense requires a court to consider the special concerns which pregnancy poses. A proposed BFOQ relating to capacity for pregnancy (or actual pregnancy) will exclude fewer employees than a BFOQ excluding all women. The court must also consider the physical changes caused by pregnancy, i.e., the presence of the unborn child, in determining whether the employee's continuance in a particular employment assignment will endanger the health of her unborn child. These concerns are in many ways quite similar to those a court should address in a business necessity defense analysis. Indeed, in considering a BFOQ defense in a case involving pregnancy, the Eighth Circuit recently stated:

> "[T]he district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq 'is similar to and overlaps with the judicially created "business necessity" test.' *Gunther* [*v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 n.2 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980)]. The various standards for establishing business necessity are quite similar to those for determining a bfoq."

Chambers v. Omaha Girls Clubs, Inc., 834 F.2d 697, 704 (8th Cir. 1987) (decision discussed favorably in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1531 (7th Cir. 1988) (en banc)).

Sitting *en banc*, this court recently considered the bona fide occupational qualification defense in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc). At issue in *Torres* was the question of whether the Wisconsin Department of Health and Social Services could pursue its legitimate goal in

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[36] 42 U.S.C. § 2000e(k).

furthering prisoner rehabilitation through a policy excluding men from nineteen of twenty-seven guard positions in the living and hygiene areas of an exclusively women's prison institution. We noted with approval the traditional formulations of the business necessity defense. 859 F.2d at 1527. These formulations are that "'discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively,'" *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis in original)), and that "an employer [can] rely on the BFOQ exception only by proving 'that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Id.* (quoting *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

We next discussed the need for courts conducting BFOQ analyses to avoid either using traditional stereotypes or falling into the equally unsatisfactory alternative of ignoring the real differences between men and women. We stated:

> "It is also well established that a BFOQ may not be based on 'stereotyped characterizations of the sexes.' *Dothard*, 433 U.S. at 333. . . . Nevertheless, while recognizing that sex-based differences may justify a limited number of distinctions between men and women, we must discipline our inquiry to ensure that our tolerance for such distinctions is not widened artificially by—as the district court aptly put it—our 'own culturally induced proclivities.' *Torres*, 639 F. Supp. at 278. Nor, of course, can we tolerate the same preconceptions or predilections on the part of employers. Rather, we must ask whether, given the reasonable objectives of the employer, the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily. *Dothard*, 433 U.S. at 336."

Torres, 859 F.2d at 1527-28.

Torres' conclusion that Congress intended the bona fide occupational qualification defense as a recognition of the real differences between men and women accords with Congress' approach in both Title VII and other contexts concerning matters involving distinctions based upon realistic physical differences between men and women. For example, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court affirmed the exclusion of women from the military draft based upon a congressional determination that women were not suited for combat. The Court noted that

> "Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. In the words of the Senate Report:
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> > 'The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee . . . . Current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy.'"

453 U.S. at 76-77 (quoting S. Rep. No. 96-826 at 157, U.S. Code Cong. & Adm. News 1980, 2647). Likewise, in *California Federal Savings & Loan Association v. Guerra*, 107 S. Ct. 683, 694 (1987), the Supreme Court recognized that in enacting Title VII Congress did not intend to preclude state pregnancy leave legislation which recognized "*actual physical disability* on account of preg-

nancy," (emphasis in original), and that did "not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." Finally, Title IX requirements with respect to equality between men and women in athletic programs have been administratively interpreted to allow separate male and female teams and to permit exclusion of women from contact sports. *See* 7 C.F.R. § 15a.41(b), 10 C.F.R. § 1040.44(b), 34 C.F.R. § 106.41(b), 45 C.F.R. § 86.41(b). The risk of injury to women from contact sports is based upon the recognized innate physical differences between men and women, matters analogous to Johnson's fetal protection policy's concern with the differences between men and women relating to childbearing capacity. Thus, as *Torres* holds, the Title VII bona fide occupational qualification defense is another legitimate congressional recognition that real physical differences between men and women can and do justify differences in their treatment.

After establishing the general policies underlying the BFOQ defense, *Torres* set forth a method for ascertaining the validity of a BFOQ.

> "The validity of a BFOQ can only be ascertained when it is assessed in relationship to the business of the employer. Our first step, therefore, *must be to come to an understanding of the employer's business*—its mission and the methodologies necessary to fulfill that mission. *In accomplishing this task, we cannot deal in generalities. Rather, we must focus on the 'particular business' of the employer in which the protected employee worked.* Oftentimes, this task requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession. *See Pime v. Loyola Univ.*, 803 F.2d 351, 353-54 (7th Cir. 1986) (upholding the maintenance of a Jesuit 'presence' as 'important to the successful operation of the University,' when there was evidence that it was 'significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus')."

Id. at 1528-29 (citations omitted, emphasis added). In the context of the administration of a state prison, we considered how a specific definition of a business could permit a bona fide occupational qualification in a case where a general definition of the business might not permit such a qualification:

> "Here . . . the broadest description of the 'business' of the defendants is to say that they are in the business of governance at the state level. This general description, standing alone, gives them no special license with respect to Title VII. . . . A more precise definition of the 'business' of the defendants is to recognize that they are in the business of administering a penal institution. Few tasks are more challenging.
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> This general description of the task of prison administrators is still too general to permit us to assess accurately the claims of the parties. . . . [W]e must . . . refine our focus. The defendants are charged with the administration of a distinct type of penal institution—a women's maximum security facility. . . . [T]he same historical and empirical evidence that might guide the administrator of a similar institution for males simply is not available with respect to this environment. Therefore, *the administrators . . . were obliged, to a greater degree than their counterparts in male institutions, to innovate in achieving one of the tasks mandated by the Wisconsin legislature—rehabilitation.* The defendants'

'business' explicitly included—by legislative mandate —the task of rehabilitation."

Torres, 859 F.2d at 1529-30 (emphasis added, citations omitted).

Torres bears particular relevance to our discussion of the description of Johnson Controls' business. At a broad level, Johnson's business, insofar as relevant to this case, is the manufacture of batteries.[37] Johnson's business is "unique" because it requires the use of lead, an extremely toxic substance that has been scientifically established to pose very serious dangers to young children and, in particular, to the offspring of female employees. In order to respond to the problems accompanying its unique battery manufacturing operation, Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible. This safety interest is every bit as critical to the mission of Johnson's battery manufacturing business as rehabilitation of prisoners is to the mission of the prison facility at issue in *Torres*. Furthermore, like the prison in *Torres*, Johnson has found it necessary to "innovate" to achieve its essential goal of manufacturing batteries safely through the adoption of a fetal protection policy that would address the health safety problems related to its female employees significantly more effectively than the alternative policies it had considered. *See* Sections II and IV-C, *supra*.

Having established that industrial safety (preventing hazards to health) is legitimately part of the "essence" of the "business" of a battery manufacturer, as it is of any manufacturing enterprise, the next inquiry under *Torres* is whether Johnson Controls' fetal protection policy is "directly related" to industrial safety. See *Torres*, 859 F.2d at 1530. Certainly a policy is directly related

[37] As noted in footnote 34, *supra*, Johnson Controls' battery division is only a small segment of its entire business operation.

to industrial safety when it protects unborn children from a substantial risk of devastating and permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical.

As in *Torres*, "[t]he more difficult question is whether the proposed BFOQ [is] 'reasonably necessary' to furthering the objective of [industrial safety]." *Torres*, 859 F.2d at 1530. In "unique" businesses, like the living areas of the women's prison in *Torres* or Johnson Controls' battery manufacturing operation, where an employer adopts an employment policy designed to address a difficult societal problem, *Torres* requires that courts reviewing such a determination under Title VII give some deference to the employer's decisions. As we noted in *Torres*:

> "We believe . . . that the defendants were required to meet an unrealistic, and therefore unfair burden when they were required to produce 'objective evidence, either from empirical studies or otherwise, displaying the validity of their theory.' *Torres* [*v. Wisconsin Dept. of Health and Social Services*, 639 F. Supp. 271, 280 (E.D. Wis. 1986)]. Given the nature of their 'business'—administering a prison for female felons—the defendants, of necessity, had to innovate. Therefore, their efforts ought to be evaluated on the basis of the totality of the circumstances as contained in the entire record. In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases. However, their judgments still are entitled to substantial weight when they are the product of a reasoned decision making process, based on available information and experience."

859 F.2d at 1532 (citations omitted). *Cf. Wards Cove*, 109 S. Ct. at 2127 (" 'Courts are generally less competent

than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate [employment practice] in response to a Title VII suit.").

In resolving the question of whether Johnson Controls' BFOQ is reasonably necessary to industrial safety, we recognize that Title VII establishes the general propositions that a determination of whether a proposed BFOQ is "reasonably necessary" to furthering the objective of industrial safety requires that Johnson Controls "'had reasonable cause to believe, that is, a factual basis for believing that all or substantially all [women capable of pregnancy] would be unable to perform safely and efficiently the duties of the job involved,'" *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969)), and that "[i]n the *usual* case, the argument that a particular job is too dangerous for *women* may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the *individual woman* to make that choice for *herself*." *Dothard*, 433 U.S. at 335 (footnote omitted, emphasis added). *It is important to remember, however, that while Dothard established these propositions as general rules, the Supreme Court determined that Dothard was an unusual case justifying a departure from this general maxim.* The Court stated: "More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum security male prison." *Id.* The Court concluded that a bona fide occupational qualification excluding women from such positions was justified because a woman's sex could create a risk of sexual assaults which would undermine prison security. *See Id.* at 335-37.

Similarly, "[m]ore is at stake in this case . . . than an individual woman's decision to weigh and accept the risks of employment." *Id.* at 335. A female's decision to work in a high lead exposure job risks the intellectual and physical development of the baby she may carry. The status of women in America has changed both in the family and in the economic system. Since they have become a force in the workplace as well as in the home because of their desire to better the family's station in life, it would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure. The unborn child has no opportunity to avoid this grave danger, but bears the definite risk of suffering permanent consequences. This situation is much like that involved in blood transfusion cases. There courts have held that individuals may choose for themselves whether to refuse to personally acquiesce in a blood transfusion that had been established as medically necessary, but that parents may not always rely upon parental rights or religious liberty rights to similarly refuse to consent to such a medically necessary transfusion for their minor children.[38] The risks to the unborn child from lead are also shared by society in the form of government financed programs to train or maintain a handicapped child in non-institutional or institutional environments and to provide the child with the training necessary to overcome the mental and physical harm attributable to lead exposure.[39] Thus, since "more

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[38] In these cases a court will commonly appoint a guardian *ad litem* with the authority to consent for the child to the required transfusion and will hold a hearing to determine whether the child has been medically neglected as a result of the denial of the transfusion. *See generally In re E. G.*, 161 Ill.App.3d 765, 515 N.E.2d 286, 287 (1987), *appeal allowed*, 520 N.E.2d 385 (1988).

[39] *Cf. State v. Acker*, 26 Utah 2d 104, 485 P.2d 1038, 1039 (1971); *Love v. Bell*, 465 P.2d 118, 121 (Colo. 1970) (Costs to society from caring for motorcycle accident victims support mandatory motor-

is at stake" than the individual woman's decision to risk her own safety, *Dothard* supports, rather than bars, a conclusion that an employer's fetal protection policy constitutes a bona fide occupational qualification. In such circumstances, "given the reasonable objectives of the employer, the very womanhood . . . of the employee undermines . . . her capacity to perform a job satisfactorily." *Torres*, 859 F.2d at 1528 (citing *Dothard*, 433 U.S. at 336).

Against this substantive background, we hold that Johnson has carried its burden of demonstrating that its fetal protection plan is reasonably necessary to further

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cycle helmet laws in states that have these laws). As the Supreme Court of Washington, sitting *en banc* observed:

> "The legislature could also reasonably assume—and legislate on such assumption—that the public welfare and safety is substantially affected by the dangers arising from motorcycle riding. The public has already assumed many burdens and responsibilities in helping ameliorate the effects of accidents. It has at public expense substantially provided emergency ambulance, medical and hospital care for persons injured on the public highways and supplied medical, surgical and hospital services for indigent persons so injured. The public has undertaken the basic responsibility of policing the public highways and regulating traffic thereon both in the interests of safety and efficiency, and has utilized the state and its political subdivisions to carry these burdens. The greater the number of serious injuries to the head and upper spine suffered by motorcycle riders, the greater the burdens it can reasonably be said are imposed on the publicly supplied or regulated medical, hospital, ambulance and police services. There thus exists a reasonably manifest connection between the use of protective helmets by motorcycle riders and the public health, welfare and safety. Accordingly, requiring motorcycle riders to wear protective helmets of a type approved by the state commission on equipment when riding upon the public highways is a legitimate and reasonable exercise of the police power, and RCW 46.37-530(3) is a constitutional declaration thereof."

State v. Laitinen, 77 Wash. 2d 130, 459 P.2d 789, 791-92 (1969), *cert. denied*, 397 U.S. 1055 (1970).

industrial safety, a matter we have determined to be part of the essence of Johnson Controls' business. Initially, there can be no doubt that the exclusion of women who are actually pregnant from positions involving high levels of lead exposure sets forth a bona fide occupational qualification. As established in section II, *supra*, there is clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure in the womb. This danger is "hardly a '[m]yth or purely habitually assumption.'" *Torres*, 859 F.2d at 1531 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)). The convincing scientific evidence of this risk and the very serious consequences of this danger combine to make this health risk quite different from the concerns in *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), which we would currently characterize as stereotypical rather than real. *Compare Dothard*, 433 U.S. at 333 (noting "that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes"); *Torres*, 859 F.2d at 1527-28 (distinguishing between "stereotyped characterizations of the sexes" and "real . . . differences between men and women").

We are also of the opinion that Johnson Controls' well reasoned and scientifically documented decision to apply this policy to all fertile women employed in high lead exposure positions constitutes a bona fide occupational qualification. The evidence presented concerning the fingering effects of lead in a woman's body, combined with the magnitude of medical difficulties in detecting and diagnosing early pregnancy, lead us to agree with Johnson Controls that there exists a reasonable basis in fact to conclude that an extension of this policy to all fertile women is proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead.

Based upon the current status of research into lead's hazardous effects, we also agree that Johnson Controls has demonstrated to our satisfaction that exclusion of fertile women from positions in any area of its battery plant in which an employee has reported a blood lead level in excess of 30 μg/dl or where an air lead measurement has been in excess of 30 is reasonably necessary to the industrial safety-based concern of protecting the unborn child from lead exposure. At the time Johnson Controls adopted its policy, the 30 μg/dl lead exposure level coincided with the Centers for Disease Control's determination of acceptable blood lead levels for children. *See* n.7, *supra*. However, it is becoming increasingly clear that the 30 μg/dl lead exposure level once believed to be safe for unborn children is no longer medically accepted as risk free. As mentioned previously, the Centers for Disease Control, in 1985, based upon "current knowledge concerning screening, diagnosis, treatment, followup, and environmental intervention for children with elevated blood levels," revised the level of elevated lead exposure from 30 to 25 μg/dl and suggested that an unborn child's blood lead level remain below 25 μg/dl. As also noted previously, recent lead studies suggest that harm may be present at levels even lower than those earlier believed to be safe.[40] Thus, lead absorption levels such as those mandated by OSHA, which were thought to have been sufficiently protective of the unborn child when they were enacted over ten years ago, are now considered insufficient. Medical knowledge is, indeed, a rapidly changing field as was noted in an early opinion:

> "Surgical techniques have changed rapidly over the years . . . . Advances such as the transplating of a heart and kidneys in the 1950's and 1960's or the reattachmnet of a severed hand or arm were unthought of many years ago. Future advances, particularly, in teaching hospitals, will be too extraordinary to even predict."

Rod v. Farrell, 96 Wis.2d 349, 359, 291 N.W.2d 568, 573 (1980) (Coffey, J., concurring). Recent advances in scientific knowledge demonstrate that Johnson Controls' cautious approach has been consistent with the emerging knowledge that the unborn child may be adversely affected by lead levels below those permitted by OSHA standards. An example of a similar practice found in everyday experience is the medical and dental professions' extreme care and caution in the use of X-ray procedures on pregnant women. These procedures are generally avoided during pregnancy and, when absolutely necessary, are performed in manners designed to minimize any possible danger to the unborn child.

The analysis that we have conducted under the bona fide occupational qualification standards of Title VII is analogous to the approach the Supreme Court took in the First Amendment context in *Sable Communications v. F.C.C.*, 109 S. Ct. 2829 (1989). There the Supreme Court dealt with the question of whether Congress' ban on "dial-a-porn" services was narrowly tailored to serve a compelling governmental interest "in protecting the physical and psychological well-being of minors,"[41] very similar to Johnson's interest in protecting the health of the unborn through the female employee. In the constitutional context, as in the bona fide occupational qualification context, when an entity attempts to further this type of interest it must be accomplished with " 'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms,' " [42] or, in this case, Title VII rights. The

[40] *See* J. N. Davis and D. Svendsgaard, *Lead and Child Development*, 329 Nature 297 (1987) (collecting results of recent studies in this area).

[41] *Sable*, 109 S. Ct. at 2836.

[42] *Id.* (quoting *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (citations omitted)).

Court went on to apply this analysis in considering the same type of question at issue in this case, whether the current status of technology requires a "total ban" or whether there are alternatives which would less comprehensively restrict the involved rights while still effectively furthering the relevant institutional interests. The Court determined that Congress' enactment was improper based upon its conclusion that "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Sable*, 109 S. Ct. at 2838. The Court's analysis began:

> "The Government . . . argues that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children. [*Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir.) (*Carlin III*), *cert. denied*, 109 S. Ct. 305 (1988)]."

Sable, 109 S. Ct. at 2837. The Supreme Court went on to note that it disagreed with the government's assertion that it had determined that there was not a technologically feasible means to further its interests other than through a complete ban. The Court set forth the government's position:

> "The Government now insists that the rules would not be effective—that enterprising youngsters could

> and would evade the rules and gain access to communications from which they should be shielded. There is no evidence in the record before us to that effect nor could there be since the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time. In this respect, the Government asserts that in amending § 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The Government claims that we must give deference to that judgment."

Id. The Court in its rejection of this position stated:

> "[T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors.
>
> There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debate by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, that under the FCC regulations minors could still have access to dial-a-porn messages, the Congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access a dial-a-porn system. . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages. On the other hand, in the hearings on H.R. 1786, the Committee heard testimony from the FCC and other

witnesses that the FCC rules would be effective and should be tried out in practice. . . .

For all we know from the record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case it seems to us that § 223(b) [the total ban] is not narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages."

Id. at 2838-39 (citations and footnotes omitted, emphasis in original). In contrast to the government in *Sable*, as noted above, Johnson Controls research, innovated and spent at least $15 million in lead control policies and has been unable to devise a policy other than the exclusion of fertile women from high lead exposure positions that would be capable of adequately serving Johnson's legitimate interest in protecting the health of the unborn. There has been no convincing exposition in the record of any suitable alternative or of scientific, medical or technical evidence supporting the efficacy of such an alternative. We believe that in a bona fide occupational qualification case, as in a business necessity case, we are constrained by the maxim that: " 'Courts are generally less competent than employers to restructure business practices,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt [an alternative employment practice] in response to a Title VII suit." *Wards Cove*, 109 S. Ct. at 2127. Accordingly, the absence of economically and technologically feasible alternatives to Johnson Controls' fetal protection policy also supports a bona fide occupational qualification determination.

There is a reasonable basis in fact, grounded in medical and scientific research data, for concluding that Johnson

Controls' has met its burden of establishing that the fetal protection policy is reasonably necessary to industrial safety.[43] Thus, the fetal protection policy should be recognized as establishing a bona fide occupational protecting the policy against claims of sex discrimination.

VI.

A business necessity defense should be applied to a challenge to a fetal protection policy under Title VII. Johnson Controls has produced facts which would demonstrate the availability of such a defense and the UAW has failed to carry its burden of persuasion through exposition of facts necessary to present a genuine issue of material fact with respect to the absence of such a defense. Even if the bona fide occupational qualification defense is applied to this matter, Johnson Controls has demonstrated that its fetal protection policy is reasonably necessary to industrial safety. Thus, the district court's entry of summary judgment in favor of Johnson Controls is

AFFIRMED.

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[43] Judge Easterbrook suggests that "by one estimate 20 million industrial jobs could be closed to women," if "the majority is right," "for many substances in addition to lead pose fetal risks." Easterbrook Dissent at 96. This assertion is based upon the following language in Bureau of National Affairs' Special Report, *Pregnancy and Employment* p. 57 (1987): "One government source estimates that 15 million to 20 million jobs in the United States expose workers to chemicals that *may* cause reproductive injury." (Emphasis supplied). This speculative statement, taken at its face value, merely suggests a possibility of reproductive injury from unidentified and undefined toxic substances. Before our decision could be applied to any of these unidentified substances, obviously they would have to be subjected to the myriad tests and research that have conclusively established the grave risk from lead substances. Thus, an employer presenting a business necessity or bona fide occupational qualification defense would have to establish that the substance had undergone the same rigid testing and research. In addition, if ever a lead-free battery were developed, the problems in this case would fall by the wayside. We hope that this is achieved tomorrow.

CUDAHY, *Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion. I would be pleased to join almost all of Judge Easterbrook's eloquent dissent except for its disposition of the case. Here I join Judge Posner's equally cogent statement, which adopts the BFOQ standard but advocates remand for a full trial on that basis. It may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try.[1] I agree with Judge Easterbrook that this "is likely the most important sex-discrimination case in any court since 1964 . . ." and its painful complexities are manifestly unsuited for summary judgment. In any event, BFOQ defense is clearly the only one the statute allows in this disparate treatment case. It is unfortunate that the majority gives a

[1] On this issue, I disagree with Judge Easterbrook's conclusion that the BFOQ standard could *never* be satisfied in a case such as this. As Judge Posner's dissent suggests, the BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking. However, the employer must demonstrate "a factual basis for believing that all or substantially all women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved." *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). As Judge Easterbrook notes in discussing the disposition of this case under the *Wright-Hayes* standard, substantial factual questions remain concerning whether occupational exposure to lead presents a substantial risk to the fetus, whether this risk is transmitted only through the pregnant woman and whether less restrictive alternatives would adequately safeguard the employer's interest in fetal health and safety. So long as it is understood that the burden to prove these matters rests on the employer, and that this burden may not be met by unsubstantiated hypotheses or claims of scientific uncertainty, *see Torres v. Wisconsin Dep't of Health & Social Servs.*, 859 F.2d 1523, 1533-34 (7th Cir. 1988) (en banc) (Cudahy, J., dissenting), I am comfortable with allowing the employer at least the opportunity to attempt to meet this demanding standard.

new life of sorts to the result-oriented gimmickery of *Wright v. Olson Corp.*, 697 F.2d 1172 (4th Cir. 1982).

It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This may be quite significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but weil-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make? We, who are unfortunately all male, must address these and other equally complex questions through the clumsy vehicle of litigation. At least let it be complete litigation focusing on the right standard.

POSNER, *Circuit Judge*, dissenting. Johnson Controls refuses to employ any woman to make batteries unless she presents medical evidence of sterility. Today this court holds that refusal lawful under Title VII. A reader of the majority opinion might be excused for thinking that the case had been fully tried—and before this court—rather than decided by a district judge on a motion for summary judgment. I think it a mistake to suppose that we can decide this case once and for all on so meager a record. It is a mistake whether we affirm, on the ground that the evidence of danger to the fetus of a woman working in an environment dense with airborne lead, combined with evidence of the difficulty of reducing the amount of lead any further, conclusively establishes the lawfulness of Johnson Controls' policy, or reverse, with directions to enter judgment for the plaintiffs, on the ground that Title VII outlaws all fetal protection policies because all bear more heavily on female than on male workers.

Title VII forbids an employer deliberately to exclude a worker from a particular job because of the worker's sex unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2 (e)(1). This defense is central to the appeal and we should attend carefully to its scope and meaning. It is written narrowly and has been read narrowly. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523, 1527-28 (7th Cir. 1988). There is no useful legislative history concerning the defense, and—no doubt because the prohibition of sex discrimination was added to Title VII at the last minute—no reference at all to the application of the defense to sex discrimination. A narrow reading is, nevertheless, inevitable. A broad reading would gut the statute. For it is unlikely that most employment discrimination in the private sector is irrational. Few private employers discriminate without having some reason for doing so; competition tends to drive from the market firms that behave irrationally. See Becker, The Economics of Discrimination (2d ed. 1971). If the defense of bona fide occupational qualification were broadly construed—for example, to excuse all sex discrimination that the employer could show was cost-justified—very little sex discrimination in employment, as well as very little employment discrimination based on religion or national origin (forms of discrimination that, like sex discrimination but unlike discrimination based on race or color, are also excused if a bona fide occupational qualification is established), would be forbidden. Title VII's reach would be shortened drastically.

Two courts of appeals faced with challenges under Title VII to fetal protection policies have concluded that such policies can never satisfy the stringent requirements of the occupational qualification defense. See *Wright v. Olin Corp.*, 697 F.2d 1172, 1185 (4th Cir. 1982); *Hayes v.*

Shelby Memorial Hospital, 726 F.2d 1543, 1549 (11th Cir. 1984). But this conclusion, rather than resulting in instant victory for the plaintiffs, led those courts to stitch a new defense expressly for fetal protection cases. See 697 F.2d at 1183-92; 726 F.2d at 1548-54. I am not myself deeply shocked that courts sometimes rewrite statutes to address problems that the legislators did not foresee—a notable but not isolated example being the judicial interpolation of the word "reasonable" into section 1 of the Sherman Act to prevent that atomization of society that Justice Holmes so feared. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978); *Northern Securities Co. v. United States*, 193 U.S. 197, 410 (1904) (Holmes, J., dissenting). Speaking of Holmes, he wrote a splendid opinion holding that a requirement in the Massachusetts constitution of a "written vote" could be satisfied by a voting machine that involved no writing. See *In re House Bill No. 1,291*, 178 Mass. 605, 60 N.E. 129 (1901). And in the famous "murdering heir" case, *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), the court in effect inserted the words "unless the legatee murdered his testator" into a statute that entitled legatees to inherit under wills executed with the proper formalities. (Notice the age of these last two cases; they were not the work of newfangled judicial activists.) Recently the First Circuit struck two words from a federal statute to make it make sense. See *United States v. Colon-Ortiz*, 866 F.2d 1, 11 (1st Cir. 1989). There are many similar examples. I do not think judges must or should ratify absurd results by sticking doggedly to the plain meaning of statutory language.

But we do not need to bite this bullet here, because the wording of the occupational qualification provision is not so cramped that it has to be stretched to bring (some) fetal protection policies within its scope. Cf. *Pime v. Loyola University*, 803 F.2d 351, 356-57 (7th Cir. 1986)

(concurring opinion). Nor is a defensible way of stretching it to recast what is plainly a disparate treatment case—that is, a case of intentional discrimination against a protected group—as a disparate impact case, and then invoke the recent decision in which the Supreme Court expanded the "business necessity" defense. See *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989); also *Allen v. Seidman*, No. 88-1811 (7th Cir. July 27, 1989). This legerdemain is as unnecessary as it is questionable. "[R]easonably necessary," one of the key terms of the occupational qualification defense, means more than just reasonable but less than absolutely necessary. On the way to concluding that the defense is unavailable in fetal protection cases the court in *Wright* misquoted the provision by leaving out the word "reasonably," see 697 F.2d at 1185 n. 21, and the misquotation is faithfully repeated in *Hayes*, see 726 F.2d at 1549. The other key words of the defense, "*normal* operation" (emphasis added), should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal. To confine the occupational qualification defense to concerns with price and product quality would deny a defense to Johnson Controls even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries. I do not understand the plaintiffs to be arguing that Title VII requires Johnson Controls to permit women known to be pregnant to continue working in an atmosphere dense with lead. If on the other hand a fetal protection policy that excludes women from a given job classification cannot be said to be reasonably necessary to the employer's normal operation, I do not see

why we should *want* to save it from condemnation under Title VII.

I have described what I conceive to be the scope of the bona fide occupational qualification defense, and its application to sex discrimination, as of the original enactment of Title VII. I must now consider the bearing of the Pregnancy Discrimination Act of 1982, which amended Title VII by defining sex discrimination to include discrimination on the basis of pregnancy. The only section amended was the definition section, 42 U.S.C. § 2000e (k). The prima facie case of sex discrimination was broadened; the defenses remained unchanged. Maybe *Scherr v. Woodland School Community Consolidated District No. 50*, 867 F.2d 974, 978 (7th Cir. 1988), goes too far in saying that "as a definition amendment, the PDA provides no substantive rule to govern pregnancy discrimination." For one thing, the amendment shows that the present case really is a disparate treatment case, that is, a case of intentional discrimination that can be excused only if the defendant establishes a bona fide occupational qualification; the amendment makes fertile women, the group that Johnson Controls deliberately excluded from a job classification, a group protected by Title VII. The amendment also helps us understand that the occupational qualification defense could not be merely a cost justification or reasonable relation defense, for if it were, the amendment would be ineffectual. Any employer can prove that it costs *something* to make an accommodation for pregnant or potentially pregnant workers and therefore it is rational not to make the accommodation. But we already knew the defense was a narrow one.

The defense is applicable to this case and although it is of limited scope it is not the proverbial eye of a needle. In particular, the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties. An

employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees. A pregnant employee exposed to heavy concentrations of lead in the air may absorb the lead into her bloodstream and from there transmit it to her fetus through the placenta, causing, years later, mental retardation or other injury to the child. The parties agree that there is a solid medical basis for concern with fetal injury from airborne lead in the concentration found in battery plants, and this concern could in turn cause the employer to worry about being sued by injured children of his employees. Such a suit would not be preempted by workers' compensation law, because the plaintiff would not be the worker. The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. See, eg., *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 200 n. 14, 342 N.W.2d 37, 53 n. 14 (1984); *In re Estate of Infant Fontaine*, 519 A.2d 227, 230 (N.H. 1986); *Fabianke v. Weaver*, 527 So. 2d 1253, 1258 (Ala. 1988). It would merely make the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.

Some courts have said that to create liability, the injury to the fetus must occur after the fetus has become viable (able to survive outside the mother's body). And as I just noted, lead in the mother's bloodstream can enter the fetus very early in the pregnancy—this presumably is the reason that Johnson Controls' fetal protection policy is so strict. But the distinction between

injury to the fetus before it becomes viable and injury after makes no sense with regard to tort liability—since the plaintiff is the child, not the fetus—and has generally and correctly been rejected. See, e.g., *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978); Prosser and Keeton on the Law of Torts § 55, at pp. 368-69 (5th ed. 1984).

Other questions concerning tort liability remain unanswered—in particular whether the standard of liability is negligence or strict liability and whether compliance with OSHA's rules on safe levels of airborne lead is a defense. As a result it is difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example drove the asbestos industry into bankruptcy), to dismiss it as trivial. The possibility of tort suits against battery manufacturers for lead injury to the child of a female employee is not merely a theoretical one. There has already been one reported case; the plaintiff got to a jury, but lost. See *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985). It is true that Johnson Controls has not yet attempted to document its liability concerns (one can understand the company's reluctance, by drawing public attention to its exposure to tort liability, to invite suits). But in moving for summary judgment the company was not required to present all its evidence to the district judge on pain of being barred from presenting it at the trial and I believe should be held to determine whether sex is a bona fide occupational qualification for making batteries.

We should not dismiss the concern over tort liability as a narrow, selfish "bottom line" concern irrelevant to the purposes of Title VII. The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers'

bloodstreams. That is a social cost that Title VII does not require a company to ignore. At some point it may become large enough to affect the company's normal method of operation and supply the ground for a bona fide occupational qualification of infertility.

A related point is that an employer might have moral qualms about endangering children or might fear the effect on his public relations. The ethical concern cannot be wholly dismissed, as could an ethical conviction that a woman's place is in the home. We know from the controversy over abortion that many people are passionately protective of fetal welfare, and they cannot all be expected—perhaps they cannot be required—to park their passions at the company gate. That "strong [state] interest in protecting the potential life of the fetus" of which the Supreme Court spoke in *Maher v. Roe*, 432 U.S. 464, 478 (1977), and other cases is not a judicial invention; it is the product of a groundswell of powerful emotion by a significant part of the community, and is only indirectly, although possibly substantially, in conflict with women's workplace aspirations. Granted, in *Doe v. First National Bank*, 865 F.2d 864, 873 (7th Cir. 1989), we assumed that the Pregnancy Discrimination Act forbids an employer to fire a woman for having an abortion, and although the point had not been argued our assumption may well have been correct. See H. Conf. Rep. No. 1786, 95th Cong., 2d Sess. 4 (1978) ("no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion"). If so, the result is to place a limitation on an employer's effort to protect fetal life. But the Pregnancy Discrimination Act affects only the prima facie case of sex discrimination. The defenses are untouched. No defense of bona fide occupational qualification was pleaded in *Doe*.

If the hazard to the fetus from airborne lead in the mother's workplace is sufficiently great, if the amount of

lead in the environment cannot be reduced without discontinuing the production of batteries, and if experience demonstrates that some women will become pregnant even after being clearly warned of the hazards to which the fetus would be exposed (there are many careless pregnancies, as is shown by the frequency of abortion and of illegitimate birth), I can find nothing in the text of the statute, or in its history or purpose, to prevent an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead on the ground that such refusal is reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of his particular business. It is a matter of degree, and this we cannot assess on a summary judgment record. Of course the acceptance of the defense might be a hardship for those women who, though fertile, would not become pregnant. But hardship for the plaintiff is a possibility whenever a defense is sustained. It is no more than a possibility here, as we shall see.

Let us not be deceived by superficial historical analogies or facile invocations of "paternalistic." It is true that laws discriminating against women were once defended on the basis of a compelling social interest in protecting their fitness to bear and raise children, see, e.g., *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), that this ground may have masked a desire to prevent women from competing with men for jobs (in any event this may have been the effect, see Landes, *The Effect of State Maximum Hours Laws on the Employment of Women in 1920*, 88 J. Pol. Econ. 476 (1980)), and that many modern American women resent the suggestion that women have a special responsibility for perpetuating the human race. But we do not have a discriminatory *law* here. A law that commands all employers in a given line of business to treat women specially cannot be equated to a decision by a firm in a competitive market to treat them specially,

if only because in the latter case other firms are free to follow a different course. There is also a difference between protecting women against themselves as well as protecting children, and protecting an employer and his employees' unborn children. A paternalistic measure is one that protects a person against himself, and insofar as Johnson Controls was motivated in adopting its fetal protection policy by concern with tort liability or adverse public relations, it was acting to protect its own interests. A fetus, moreover, is a different person (or protoperson) from its mother, and not all pregnant women fully internalize the welfare of their fetus, infant, or child. There are plently of selfish and irresponsible parents, not all of whom are male. A fetal protection policy is less paternalistic than a maximum-hours law.

I conclude that Title VII even as amended by the Pregnancy Discrimination Act does not outlaw all fetal protection policies. Whether a particular policy is lawful is a question of fact, and since the burden of proof is on the defendant it will be the rare case where the lawfulness of such a policy can be decided on the defendant's motion for summary judgment. This is not that rare case. Even if we accept that the amount of airborne lead in Johnson Controls' battery-making operation is dangerous to the fetuses of female employees and that the company cannot reduce the danger further without shutting down the operation, a host of unanswered questions remains. The first concerns the feasibility of warnings as a substitute for a blanket exclusion of all fertile women. Before Johnson Controls adopted the blanket exclusion, eight women employed in the battery operation had become pregnant in three years. But we do not know what fraction of women employed in the operation this was, because—remarkably—the record does not reveal the number of women employed in the operation. And the only warning that was in effect during that period was one more likely to allay than to arouse concern. It

compared the fetal hazards of airbrone lead to those of cigarette smoking, and many women do not believe that smoking is highly hazardous to the fetus. The plaintiffs believe that a real "scare" warning would have deterred those eight pregnancies; maybe they are right.

We do not know what other manufacturers of batteries do about the hazards of airborne lead to the fetus—whether they are content to rely on warnings, for example, and if so of what kind and with what effect. Apparently General Motors once had a fetal-protection policy identical to that of Johnson Controls, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex. L. Rev. 1025, 1058 n. 198 (1977); I have no idea whether it still does. The evidence of record concerning the potential hazard to the fetus through a father exposed to airborne lead is fragmentary and stale, yet if that hazard is significant the fact that Johnson Controls does nothing about it undermines the company's argument that its fetal protection policy is motivated by concern for the fetus and reasonably necessary to the operation of the battery business. See *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 998-99 (5th Cir. 1984). The evidentiary gap is due in part to the fact that the record on which the district judge based his grant of summary judgment was closed two and half years ago. A further consequence of the aging of the record is that we lack up-to-date information on the hazards of airborne lead to the fetus even through the mother. The record is also blank on the wages and alternative employment opportunities of the women employed in Johnson Control's battery operation. These data would be pertinent to the plaintiffs' ingenious although speculative argument that by depriving women of high-paying jobs, fetal protection may reduce women's expenditures on fetal and child care, possibly harming the fetus and child as much as do the environmental hazards against which those policies are directed.

We also do not know how profitable the business of manufacturing batteries is, and therefore how vulnerable it is to fears, as yet speculative, of litigation arising from fetal damage. (The case at this stage is a tissue of speculation.) Apparently a vaccine was once withdrawn temporarily from the market because of fears of possible litigation, see H.R. Rep. No. 908, 99th Cong., 2d Sess. 6 (1986); see generally Gaskins, Environmental Accidents: Personal Injury and Public Responsibility 161-62 (1989), and the lower the profit margin in making batteries the more plausible a concern with possible litigation becomes. The plaintiffs would have won a Pyrrhic victory if as a result of their winning this suit Johnson Controls shut down its battery operation, or if, as has happened with so many products formerly manufactured in this country, production shifted overseas and American automobile makers—which already use plenty of imported components—imported batteries made by companies that may have no regard either for fetal safety or for women's welfare. If Johnson Controls terminated its battery operation as a result of this suit, the plaintiffs would be in the same position as if the occupational qualification defense had prevailed except that they might—which is to say, realistically, that their lawyers might—recover attorney's fees. A "failing company" or "failing division" component of the occupational qualification defense makes at least as much sense as the counterpart provision in antitrust law.

Even on the limited record before us, however, it is clear that the defendant's fetal protection policy is excessively cautious in two regards: first in presuming that any woman under the age of 70 is fertile, and second in excluding a presumptively fertile woman from any job from which she might ultimately be promoted into battery making, even if her present job does not expose her to lead. Since these aspects of the policy are severable from the rest of it I do not think their deficiencies need

condemn the entire policy, especially since the first is harmless because a woman too old to bear children has only to submit a letter to that effect from her doctor to be permitted to work in the battery plant. But these deficiencies do underscore the precipitancy of deciding this case in the defendant's favor on the basis of the present record. It is not enough that an employer has *some* reason for adopting a policy that discriminates against women. Otherwise *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), which struck down gendered annuity tables, would have come out the other way. Yet it would be a mistake to infer from *Manhart* that policies that lump all (or most) women into a class for unfavorable treatment are therefore unlawful per se. They are discriminatory, but this just means that the employer must shoulder the burden of establishing that the classification which excludes women is reasonably necessary to the normal operation of his business. That the occupational qualification defense remains available in such case is implicit in the Court's discussion of the defense in *Manhart*. See *id.* at 716 n. 30.

The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health.

But although the defendant did not present enough evidence to warrant the grant of summary judgment in its favor, there is no ground for barring it from presenting additional evidence at trial. Therefore it would be equally precipiate for us to direct the entry of judgment in the plaintiffs' favor—something that the plaintiffs in the

conclusion of their brief do not ask us to do, even though Rule 28(a)(5) of the Federal Rules of Appellate Procedure requires the appellant to place at the end of his brief "a short conclusion stating the precise relief sought." They do argue earlier in the brief that Johnson Controls' fetal protection policy is invalid, and if accepted this argument would obviate the need for a trial. But it is premature to accept it, as the plaintiffs themselves may have realized in formulating their request for relief. We should be as hesitant to endanger the health of children by condemning all fetal protection policies as we should be hesitant to endanger the jobs of women by placing our imprimatur on such policies. We should vacate the district court's judgment and remand for further proceedings to enable the compilation of an adequate evidentiary record.

EASTERBROOK, *Circuit Judge*, with whom FLAUM, *Circuit Judge*, joins, dissenting. Whether the employers should restrain adults from engaging in acts hazardous to their children is an ethical, medical, economic, and political problem of great complexity. But this is a statutory case, and we must implement the law rather than give our own answer. Jonhson's policy is sex discrimination, forbidden unless sex is a "bona fide occcupational qualification"—which it is not.

I

Title VII of the Civil Rights Act of 1964 forbids employers "to discriminate against any individual . . . because of such individual's . . . sex", 42 U.S.C. § 2000e-2(a)(1), unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise", 42 U.S.C. § 2000e-2(e)(1). Both the district court and the majority believe that the fetal protection policy may be lawful despite the absence of a BFOQ.

A

Johnson uses sex as a ground of decision. The fetal protection policy applies to all women and no men. It is not written without reference to gender, having an unwelcome side effect. Cf. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Differences between the sexes are its stated rationale. Only women tranmsit lead to children during pregnancy. Because a few women become pregnant with elevated levels of lead in the blood (in four years, eight out of an unknown number), Johnson excludes all women from the danger zone. This treats an employee not as an individual but as a woman. A plan using sex as a criterion and justified by arguments referring to sex is "discriminat[ion] . . . because of . . . sex". *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978).

General Electric Co. v. Gilbert, 429 U.S. 125 (1976), held that a rule distinguishing on account of pregnancy is not sex discrimination, because women are in both the "pregnant" and "non-pregnant" groups. See also *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court saw the line as one between pregnant employees and all others, a line based on something other than sex (or at least something in addition to sex). Johnson's line based on *ability* to become pregnant, however, is assuredly based on sex. That would be ground for distinguishing *Gilbert*, but Congress interred *Gilbert* in 1978 by enacting the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (the PDA), which provides:

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . .

This amendment to Title VII makes distinctions based on women's ability to bear children sex discrimination. It also has a built-in BFOQ standard: unless pregnant employees differ from others "in their ability or inability to work", they must be treated "the same" as other employees "for all employment-related purposes". Although located in a definitional provision, the language after the semicolon is substantive and governs Johnson's plan.

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), the only other appellate decision that has dealt with a fetal protection policy similar to Johnson's, took a different view.[1] *Wright* observed that a policy using sex as a ground of decision may cause women no more injury than a policy neutral with regard to sex, yet having a disparate impact. A policy designed to promote the health of offspring of both sexes is neutral in objective. A sex-neutral policy is judged under an approach more lenient than the BFOQ standard. Believing that a fetal protection policy rests on strong justifications, *Wright* treated the policy as sex-neutral so that it could sustain a rule functionally identical to Johnson's. 697 F.2d at 1184-92.

This makes things turn not on whether the employer uses sex as a ground of decision but on whether the employer uses sex to serve a "good" policy. If the policy is beneficient and the injury to women "tolerable" in light of the interests served, the court changes the standard of inquiry. Yet whether a policy is "good" is a statutory question, governed by the BFOQ test stated in § 2000e-2(e)(1) and the supplemental rule of the PDA that

[1] Two other cases often are treated as bearing on the validity of such policies: *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982). Both involved x-ray technicians fired immediately after their employers discovered that they had become pregnant, and not policies that disqualified women generally. I therefore put *Hayes* and *Zuniga* to one side for the time being, although they return in Part II.

women and men who are "similar in their ability or inability to work" must be treated the same. A court's belief that a good end is in view does not justify departure from the statutory framework; it is an occasion for applying the statutory framework. *Wright* ignored the PDA and inverted ordinary rules of statutory interpretation when stating (with echoes in the majority's opinion today): "The inappropriateness of applying the overt discrimination/b.f.o.q. theory of claim and defense . . . is that, properly applied, it would prevent the employer from asserting a justification defense which under developed Title VII [disparate impact] doctrine it is entitled to present." 697 F.2d at 1182 n.21. In other words, this *must* be a disparate impact case because an employer couldn't win it as a disparate treatment case. If the rigors of the BFOQ suggest the need for a fresh approach, that is a job for another branch. See *TVA v. Hill*, 437 U.S. 153 (1978). Cf. *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-23 (1989) (the standard for reviewing decisions based on race does not depend on the strength of the justification or on who gains from its use).

In principle a court could make the legal standard turn on what the authors of a rule are trying to accomplish, rather than on the criteria they use to get there. Whether to do so was the nub of the debate in *Manhart*. Los Angeles adopted a pension plan that collected more per month from women during employment and paid retired women the same per month as men. The city defended the policy by observing that the sums collected matched the actuarial value of the payments over the retired employees' lives, because the average woman lives longer than the average man and so receives more monthly checks. Was it sex discrimination prohibited by Title VII? The women said yes, on the ground that every woman paid more per month than every man. The difference was based on sex and justified by an effect (lon-

gevity) linked with sex. The employer said no, on the ground that the pension was worth the contributions *ex ante* to men and women equally, and the groups therefore were treated equally. Only by using sex as a ground of decision, the employer pointed out, could it achieve acturial equality. The Court held that the policy was sex discrimination, because the city used sex as the basis of decision. That this criterion produced equal outcomes for groups was irrelevant in the Court's view, because Title VII requires employees to be treated *as individuals*. To say that sex had been considered in order to achieve equal group averages, the Court believed, was to confess a violation of the law. See also *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

Manhart establishes two propositions that together are fatal to Johnson's position. First, Title VII requires equal treatment of employees as persons rather than equal treatment of groups defined by sex (or race, or any other criterion listed in the statute). Observing that the average member of one group does as well as the average member of another does not support the use of any given ground of decision; indeed, resorting to notions of group equality begs the question how a statute presumptively forbidding the use of these criteria could permit them to be used to justify conduct. Second, that equal treatment of employees as persons will lead to higher costs of employing persons of a given sex is no defense. An obligation to pay men and women equal amounts per month after retirement and deduct from pay the same amount per month during employment means that the employer must contribute greater sums per month during women's working years. That incremental cost of female employees is, as the Court construed the statute, no reason to treat women differently. Again this is part of the idea of an anti-discrimination law. Women may have higher pension costs, or higher medical insurance costs (because of pregnancy), or take more days off because of sickness,

or have shorter careers (again because of children). Title VII excludes these as reasons for preferring men, e.g., *Orzel v. City of Wauwatosa*, 697 F.2d 743, 755 (7th Cir. 1983). The PDA, requiring equal treatment of employees "similar in their ability or inability to work" reinforces this conclusion.

Manhart's approach is the norm in anti-discrimination law. Consider, for example, the Supreme Court's first important sex discrimination case under Title VII, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). The employer refused to hire women with preschool-age children. Such a rule might have had benefits for the children, neutral with respect to sex, but the policy was not neutral. The Court brusquely held that the policy is disparate treatment, unlawful unless supported by a BFOQ. Next consider the "bottom line" defense rejected in *Connecticut v. Teal*, 457 U.S. 440 (1982). The employer contended that so long as it hired persons in a mixture reflecting the applicants or population (the "bottom line"), it did not matter that steps along the way appeared to filter out members of one or another group. The Court disagreed, because an argument based on the bottom line treats persons as members of a group defined by sex (race, etc.) and proceeds as if the groups (rather than the applicants and employees) held the right to equal treatment. Title VII, as the Court saw it, requires the employer to treat the applicant as a person without regard to race, sex, etc., on every occasion. These cases, and others like them, dispatch arguments of the sort that because the employer pursues an end, children's welfare, defined without regard to sex, a rule of decision that uses sex as a criterion should be treated as if sex-neutral. Cf. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (same approach in constitutional law).

When the employer engages in sex, race, or age discrimination in an effort to protect customers or members of the public, courts regularly see this as disparate treat-

ment, for which a BFOQ is essential. See *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985); *Hahn v. City of Buffalo*, 770 F.2d 12 (2d Cir. 1985); *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984). There is no reason why things should be different when fetuses, rather than adult bystanders, are the subject of the employer's protection.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978), says that the details of the "prima facie case" of discrimination, and the order of proof and rebuttal at trial, are flexible and should be adjusted to the circumstances. See also *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Our case does not concern the order of proof and methods of inference; Johnson expressly uses sex to make decisions. When Wisconsin excluded male guards from a women's prison, we saw this as disparate treatment and searched for a BFOQ. *Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1523, 1526-28 (7th Cir. 1988) (en banc). Here, too, there is disparate treatment. Fetal protection policies therefore may be justified, if at all, as BFOQs.

A word about the enforcement policy of the Equal Employment Opportunity Commission. The Commission told its staff to use *Wright* and the elaboration of its approach in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), when investigating fetal protection policies. Ordinarily the EEOC's views about the meaning of Title VII are entitled to deference. This policy, however, does not so much interpret Title VII as adopt guidelines for prosecution. Prosecutorial guidelines reflect limitations on the agency's resources and existing judicial interpretations; they do not define the meaning of the law. The Commission told its staff to follow the courts.[2] The guidelines do not discuss the PDA or *Man-*

[2] The policy statement, Notice No. n915.034 (Oct. 7, 1988), says at p. 1 n.1: "three courts of appeals have considered cases in-

hart and give no reason for adopting the *Wright-Hayes* approach as opposed to the BFOQ standard. This may be sound from a prosecutorial perspective but does not address the question in our case. If the EEOC's statement is designed as an interpretive rule, it is neither reasoned nor consistent with Title VII. See *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854, 2863 (1989).

B

The statute allows an employer to show that consideration of sex is "reasonably necessary to the normal operation of that particular business". *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); *Criswell*, 472 U.S. at 422-23; *Torres*, 859 F.2d at 1527. The plaintiffs argue that "the sex based practice involved here should . . . be held invalid" (Br. 44) because the reasons Johnson offers cannot establish a BFOQ even if factually supported. The Fourth Circuit (unlike the majority of this court) believes that as a matter of law a fetal protection policy does not satisfy the standards for a BFOQ, see *Wright*, 697 F.2d at 1185 n.21, and I think it has this much correct for two reasons: Johnson's stated objectives are insufficient, and even if sufficient do not apply to all women.

Johnson defends its fetal protection policy on the basis of concern for the welfare of the next generation, an objective unrelated to its ability to make batteries (§ 2000e-2(e)(1) speaks of the "operation of the business") or to any woman's "ability or inability to work" (the standard of the PDA). Johnson allowed women to work until 1982, without ill effects on its business; for all we know (the record is silent), other firms in the same business employ

volving fetal hazards . . . , thereby helping the development of an analytical framework for deciding such cases. This policy statement is an elaboration of that framework . . . ." See also p. 4: "the Commission follows the lead of every court of appeals to have addressed the question".

women in the kinds of jobs from which Johnson excludes them. The majority does not mention the PDA, which, added to BFOQ rule, puts out of bounds the justifications Johnson offers.

At oral argument before the panel counsel offered a new defense of Johnson's policy: that it is morally required to protect children from their parents' mistakes. This justification is redolent of *Muller v. Oregon*, 208 U.S. 412 (1908), which sustained a statute curtailing women's hours of work on the ground that maternal functions unsuited women for long hours. The Court wrote:

> [B]y abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers . . . are not imposed solely for her benefit, but also largely for the benefit of all.

208 U.S. at 421-22. The "abundant testimony of the medical fraternity" turned out to be the triumph of imagination over data. Dangers decried in *Muller* are today perceived as chimerical, excuses for blockading women as effective competitors of men in the labor force. Legislation of the sort allowed by *Muller* "protected" women out of their jobs by making women less attractive as employees. An employer that needed flexibility in assigning hours of work had to hire men; women were consigned to jobs with regular hours but lower wages. See Elisabeth M. Landes, *The Effect of State Maximum Laws on*

the Employment of Women in 1920, 88 J. Pol. Econ. 476 (1980) (finding that "protective" legislation reduced women's hours, hourly wages, and annual income). Such laws also treat women in a stereotypical way. State laws requiring or allowing employers to treat women differently, on the assumption that women are less able than men to take the precautions essential for healthy children, are preempted by Title VII—not because of an express preemption clause, but because no state law may require or excuse a violation of federal law. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971). Stautes of the sort sustained in *Muller*, supported by the justifications advanced in *Muller*, are museum pieces, reminders of wrong turns in the law. It is not enough to say that Johnson is a private employer while *Muller* dealt with state laws. Title VII is addressed to private employers. The question is whether a justification of a particular kind is an acceptable defense of sex discrimination. This justification is not. No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of living woman, and that the only acceptable level risk is zero. "[T]he purpose of Title VII is to allow the individual woman to make that choice for herself." *Dothard*, 433 U.S. at 335.

Although some women may become pregnant, and a subset of their children might suffer, Johnson cannot exclude all fertile women from its labor force on their account. Most women in an industrial labor force do not become pregnant;[3] most of these will have blood lead

[3] Although some 9% of all fertile women become pregnant each year, the birth rate for blue collar women over 30 is about 2%, and of working women 45-49 only 1 in 5,000 becomes pregnant in a given year. The data are collected in Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1233 (1986). The record does not reveal the birth rate

levels under 30 μg/dl (only about ⅓ of the employees exposed to lead at Johnson's plants have higher levels); most of those who become pregnant with levels exceeding 30 μg/dl will bear normal children (Johnson reports no birth defects or other abnormalities in the eight pregnancies among its employees).[4] Concerns about a tiny minority of women cannot set the standard by which all are judged. An employer establishes a BFOQ only if there is "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), quoted with approval in *Dothard*, 433 U.S. at 333, and adopted as the law of this circuit in *Torres*, 859 F.2d at 1527, 1530. Fear of prenatal injury (which has not happened in the history of the employer) is a far cry from something that prevents "all or substantially all" women from doing their jobs.

To meet the "all or almost all" requirement, Johnson relies on an elaboration of the BFOQ for age discrimination offered in customer-safety cases: if all persons over a certain age are unsafe pilots (drivers, police officers, etc.), *or* if it is impossible to tell which of the older employees is unsafe, then age may be a BFOQ for employment. E.g., *EEOC v. Mississippi State Tax Commission*, 873 F.2d 97, 98 (5th Cir. 1989) (en banc). The genesis of the "impossible to tell" branch of the BFOQ in age

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for Johnson's female laborers, but it must be lower given Johnson's strenuous efforts to discourage pregnancy among those exposed to lead.

[4] One of the children has an elevated level of lead in the blood, but this has not produced an identifiable problem. It is hard, however, to link outcomes such as learning disabilities to lead, since learning disabilities could have many other causes, and it is therefore hard to show in an individual case (as opposed to statistically) that lead injured the child.

cases is that an unsafe employee can't do the job the employer demands. It is word play to say that "the job" at Johnson is to make batteries without risk to fetuses in the same way "the job" at Western Air Lines is to fly planes without crashing. When an employer genuinely can't tell which employees are unfit, *and* when unfitness *for work* is a serious problem, it may use a proxy that otherwise would be off limits. Johnson is not using sex to avert harm to customers. To repeat the statutory language: sex is a BFOQ when its use is "reasonably necessary to the normal operation of [the employer's] particular business" (the BFOQ rule) and employers must treat men and pregnant women equally with respect to their "ability or inability to work" (the PDA). Risk to fetuses falls outside these rules.

Johnson might be concerned about cost. It could have argued that the only alternative to the fetal protection policy is a much clearer workplace, so that no employee's blood lead level exceeds 30 μg/dl, which would be prohibitively expensive and lead it to close the business. Johnson does not make that argument, so the majority properly does not decide whether it would be a BFOQ. Another potential cost comes from tort law. Perhaps Johnson anticipated litigation filed by children injured by lead. The firm does not make this argument either, and so far as I know no child has recovered a judgment on account of parents' occupational exposure to lead. *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985), the only reported case, ended in a jury verdict for the employer even though the child argued that the employer violated OSHA's maximum exposure rules. (Johnson says that it complies with OSHA's rules.) Anyway, the prospect of tort judgments means only that female employees' average cost to Johnson exceeds that of male employees. Title VII requires employers to deal with individual employees rather than with group averages. No firm could exclude women from its work force by saying that higher costs of pensions and health

care made them too costly.[5] If those costs do not establish a BFOQ, could not establish it even in principle, how may the prospect of tort judgments do so? Title VII applies even when—*especially* when—discrimination is rational as the employer sees things.

All of this is not to say where wisdom lies. An employer is better situated than its workers to gather and interpret scientific data, for medical studies are hard to evaluate, and the need to earn a living may induce employees to give too little weight to the interests of their offspring. A recent poll showing that more than 20% of American adults do not know that the Earth orbits the Sun does not lend confidence in the ability of the populace to make decisions that depend on scientific or medical data.[6] If any given employer errs, the forces of com-

[5] Health care expenses for women are substantially higher than those for men even before taking into account the costs of pregnancy. Department of Health and Human Services, *A Summary of Expenditures and Sources of Payment for Personal Health Services From the National Medical Care Expenditure Survey, Data Preview 24* at 11 (May 1987). The PDA requires employers to pick up these higher medical costs, plus the medical costs of pregnancy, if they offer health care to male employees. And after *Manhart* employers that offer pensions must contribute more per month per female employee than per male employee.

[6] The survey concluded that 93-95% of the adult population is scientifically illiterate. "Asked whether the Earth goes around the Sun or the Sun around the Earth, 21 percent replied incorrectly; 7 percent said they did not know. . . . On other questions, the survey found that 43 percent said correctly that electrons, which are components of atoms, are smaller than atoms; 20 percent said they were larger and 37 percent said they did not know which was larger. . . . Of those surveyed, 76 percent answered correctly that light travels faster than sound; 19 percent mistakenly said that sound moves faster." *New York Times*, Oct. 25, 1988, § C p. 10 col. 4. The state of knowledge may be even worse in the United Kingdom: "Only 34% of Britons know that the earth goes around the sun (rather than vice versa) and that it takes a year to do so. Almost one-fifth are presumably busy nailing their furniture to the floor as they imagine themselves hurtling around the sun

petition open opportunities elsewhere. No one can treat lightly the possibility of injury to future children, who cannot protect themselves or participate in the decisions that will govern their lives. Trying to find the "right" accommodation would rob many a person of sleep—for rigorous implementation of fetal protection policies could close more than 20 million jobs to women,[7] while failure to do anything causes injury to unknown numbers. Under the PDA neither the employer nor the court is authorized to essay an answer to this social puzzle. The disparate treatment—BFOQ approach governs, and it resolves today's dispute. Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere.[8]

once a day. And they are confused about what the universe is: given a list comprising solar system, galaxy, earth, universe, and sun, only 53% thought that the universe was the largest item. Some 7% thought that the earth was. Asked if nuclear-power stations cause acid rain, almost half the respondents said yes, and only 34% knew that they did not. . . . So much for environmental awareness. . . . Some people seem unworried by radiation: 13% think that radioactive milk can be made safe by boiling it." *The Economist*, July 15, 1989, p. 84 col. 2.

[7] Fifteen to twenty million jobs is the estimate of the Bureau of National Affairs in *Pregnancy and Employment* 57 (1987), limited to injury caused by chemicals. Cases such as *Hayes* and *Zuniga* show that many additional women are affected by restrictions placed on other jobs, such as the x-ray technician jobs that exposed embryos to radiation. Concern about emissions from computers and their terminals has led to proposals that could restrict access even to traditional office jobs.

[8] The EPA, which administers the Toxic Substances Control Act, 15 U.S.C. §§ 2601-54, also may have authority over the subject. See Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L.J. 577, 592-98 (1986).

II

Having adopted the *Wright-Hayes* approach, we still should not affirm the district court's judgment. *Hayes* opined that a fetal protection policy applicable only to women violates Title VII

> unless the employer shows (1) that a substantial risk of harm exists and (2) that the risk is borne only by members of one sex; and (3) the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex.

726 F.2d at 1554. At the time *Wright* and *Hayes* were decided, and when the EEOC issued its policy statement, courts believed that "business necessity" in a disparate impact case is a *defense*. "Business necessity" and "BFOQ" were not so distinct. We know from *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), however, that the plaintiff bears the burden of persuasion on all questions in every disparate impact case, as the majority today emphasizes. So the *Wright-Hayes* standard has been watered down. The court's "adoption" of *Wright*, *Hayes*, and the EEOC's policy statement is thus in practice more favorable to employers than the Fourth and Eleventh Circuits (and the EEOC) anticipated their approach would be. The plaintiff won in *Hayes*; she would lose under the majority's approach.

Even on the majority's un-demanding standard, however, there are material disputes. The EEOC's policy statement properly criticized the district court for granting summary judgment despite evidentiary disputes material to the application of the *Wright-Hayes* standard. *Notice* n915.034 at 9 n.22.

Substantial Risk. Is there a substantial risk of harm to the offspring of female employees? That lead in the blood is dangerous no one doubts, although experts dispute how much is too much and whether lead is more

risky to the fetus and developing infants than to adults.[9] The extent to which lead in a mother's blood, *at levels to which Johnson exposes its employees*, endangers the fetus is a subject on which there is additional dispute. Showing great injury at 100 μg/dl is one thing; showing risks when no one has levels over 50 μg/dl (and, per OSHA's rules, anyone wanting to get below 30 μg/dl is entitled to a respirator) is another. The record does not quantify the risks at the levels OSHA permits. It also does not reveal the extent to which lead crosses the placenta. Johnson's chief medical consultant, Dr. Fishburn, believes that risk is greatest in the first weeks of pregnancy, before women can withdraw to lead-free environments. Experts take the contrary view that lead does not cross the placenta until late in pregnancy,[10] and that because lead levels in the blood fall substantially within 12 weeks of the last exposure,[11] the danger is reduced if

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[9] For a review of the evidence see William L. Marcus & C. Richard Cothern, *The Characteristics of an Adverse Effect: Using the Example of Developing a Standard for Lead*, 16(4) Drug Metabolism Reviews 423 (1985-86). Dr. Michael Silverstein, a board certified specialist in occupational medicine, testified in a deposition that the risks of a given level of lead in the blood are no greater to the fetus and children than to adults. He supported this position with an affidavit to which he attached three scientific studies. Dr. Marvin S. Legator, Director of the Division of Environmental Toxicology at the University of Texas, gave a deposition agreeing with this view, as did Dr. Ellen Silbergeld, a Senior Scientist in the Toxic Program of the Environmental Defense Fund.

[10] Dr. J. Julian Chisolm, Director of the Lead Program at the John F. Kennedy Institute in Baltimore, one of Johnson's witnesses, testified in a deposition that lead does not cross the placenta until late in the pregnancy and that the adverse effect of lead in a mother's blood does not begin until the last half of the third trimester. Dr. Silbergeld took a similar view.

[11] According to National Research Council Committee on Lead in the Human Environment 59-60 (1980), almost all lead stored in the body outside of bones is eliminated within four to six weeks

women are removed from contact with lead promptly on becoming pregnant.

It is painful to see conflicts of this kind settled by litigation; judges cannot unravel medical mysteries by observing scientists' demeanor on the stand. This is not how scientists resolve disputes among themselves. Demeanor tells the judge only whether the scientist *believes* what he says, something almost irrelevant to a scientific dispute. Scientists formulate hypotheses, collect data, and apply statistical methods to assess them; judges and jurors find this process alien. Yet so long as the substantive rule of law requires a court to resolve scientific disagreements—which the *Wright-Hayes* standard does, though the BFOQ standard avoids the problem—the judge must follow the rules, which means that material disputes must be resolved at trial.

A small risk, even if compellingly documented, is not enough to exclude women from employment. How great is too great? Most women do not become pregnant in any given year, and most female employees do not have blood lead levels exceeding 30 μg dl, so average risk to the employee population may be small. If a woman becomes pregnant with a blood lead level of 40 μg dl, is the risk one learning disability in two pregnancies? One in two thousand? One in two million? These figures imply

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of exposure. Dr. Silbergeld used the higher figure of 100 days for the elimination of lead from blood and soft tissues. Lead is released from bones much more slowly, but lead-207, the most common form they contain, is less active biologically. National Research Council on Biologic Effects of Atmospheric Pollutants 68 (1972). Even persons who have no occupational exposure ingest or inhale lead from other sources (paint, leaded gasoline, etc.), so that the actual blood lead level may drop slowly, but these sources of lead threaten offspring whether or not the mother works in Johnson's plants. It is possible that lead builds up in the placenta during early pregnancy, while the mother's blood lead level is highest, but the extent of this effect is unknown. The net effects of these offsetting processes are not quantified in this record.

different policies, yet we do not know which is correct. How risky is a blood lead level exceeding 30 μg dl compared with other hazards? Most comparisons show that smoking and drinking are quite dangerous to fetuses, more so than many contaminants found in the workplace.[12] Some 2,500 children under the age of one die every year because of their parents' smoking; others never make it to birth.[13] The hazards created by occupational chemicals span many orders of magnitude: some are safer than the sweeteners we wolf down, some are dangerous indeed.[14] Where does lead fit on that spectrum?

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[12] E.g., Surgeon General, *The Health Consequences of Smoking for Women* 191-239 (1980) (carbon monoxide, nicotine, and hydrogen cyanide from smoking cross the placenta, leading to miscarriages, reduction in fetal weight, reduced cognitive development, and Sudden Infant Death Syndrome); Alcohol, Drug Abuse, and Mental Health Administration, *Fetal Alcohol Syndrome and Other Effects of Alcohol on Pregnancy Outcome* (Sixth Special Report to the U.S. Congress on Alcohol and Health) (1987) (maternal drinking is associated with miscarriage, mental retardation of the child, low birth weight, and a characteristic set of birth defects known as "fetal alcohol syndrome"; collecting sources); Ernest L. Abel, *Fetal Alcohol Syndrome and Fetal Alcohol Effects* (1984) (collecting data on the effect of maternal drinking on the fetus); Richard B. Everson et al., *Quantitative Associations Between DNA Damage in Human Placenta and Maternal Smoking and Birth Weight*, 80 J. Nat. Cancer Inst. 567 (1988) (maternal smoking damages DNA of fetus); Steven H. Fox et al., *Perceptions of Risks of Smoking and Heavy Drinking during Pregnancy: 1985 NHIS Findings*, 102 Public Health Reports 73 (1987). Miscarriages, low birth weight, and retarded cognitive development, common consequences of maternal smoking and drinking, resemble the consequences of maternal lead but appear to be more common.

[13] Centers for Disease Control, *Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 1984*, 36 Morbidity and Mortality Weekly Report 694 (Oct. 30, 1987).

[14] See Edmund A.C. Crouch & Richard Wilson, *Risk/Benefit Analysis* 173-83 (1982); Bruce N. Ames, Renae Magaw & Lois Swirsky Gold, *Ranking Possible Carcinogenic Hazards*, 236 Science 271 (1987); John Tierney, *Not To Worry*, Hippocrates 29 (Jan/

I cannot believe that Johnson would be entitled to fire female employees who smoke or drink during pregnancy —let alone to fire all female employees because some might smoke or drink—which makes it hard to exclude women to curtail risk from other substances.

How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses? For all we can tell, accepting Johnson's argument compels us to answer "yes" to these questions, which simply points up the need to quantify the hazard. It also points up the political nature of the dispute. How much risk is too much is a moral or economic or political question, one ill suited to the processes of litigation and not the sort of question Title VII puts to a judge.[15]

Feb. 1988); John F. Morrall III, *A Review of the Record*, Regulation 25 (Nov/Dec 1986).

[15] There is a tradition in public health of resolving doubts by assuming that risks exist until they can be disproved. As the uncertainties are substantial, this process often produces measures of risk that appear to be substantial. Yet whether to assume that the maximum likely hazard will come to pass—a process known as "conservative risk assessment"—is itself a political question. A court would be obliged to try to produce the most accurate, rather than the most conservative, assessment, for resolving doubts in one direction only produces inaccurate comparisons of poorly-understood risks (which will be overstated) against well-understood risks (which would be accurately stated). See Albert L. Nichols & Richard J. Zeckhauser, *The Perils of Prudence: How Conservative Risk Assessments Distort Regulation*, Regulation 13 (Nov/Dec 1986). Yet in an effort to measure risk accurately a court would get little aid from existing studies, often tailored to fulfilling regulatory demands for a "conservative" bias.

The most concerted effort to estimate the risks lead poses to offspring was conducted by OSHA in the course of promulgating its lead rules. OSHA considered and rejected a proposal to exclude women capable of bearing children from jobs in which blood lead levels may exceed 30 μg/100 g. It stated:

> Industry testimony further suggests that women of childbearing potential could be "protected" by excluding them from employment in many parts of the lead industry. . . . The record in this rulemaking is clear that male workers may be adversely effected [sic] by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these standards will minimize risk to all persons and should therefore insure equal employment for both men and women.

43 Fed. Reg. 52953, 52966 (1978). OSHA's regulations require employers to make respirators available, so that both men and women desiring children can reduce their blood lead levels. 29 C.F.R. § 1910.1025(f)(1)(iii). They also require employers to conduct annual educational programs "with particular attention to the adverse reproductive effects on both males and females", § 1910.1025 (*l*)(1)(v)(D). In order to say that the risk to offspring at firms complying with OSHA's rules (as Johnson says it does) is so "substantial" that a woman should not be allowed to work at any job where there is the slightest chance of a blood lead level exceeding 30 μg/dl, a court must agree with the judgment of OSHA that the 50 μg/100 g limit, plus the availability of respirators to

employees seeking to attain a level of 30 μg/100 g, is enough. My colleagues essentially take judicial notice that OSHA is wrong, slip op. 52-53, an extraordinary step. The record does not contain evidence sufficient to contradict OSHA's conclusion, let alone evidence so lopsided that summary judgment is appropriate.

One more observation. "Substantial risk" must mean substantial *net* risk. Excluding women from industrial jobs at Johnson may reduce risk attributable to lead at the cost of increasing other hazards. There is a strong correlation between the health of the infant and prenatal medical care; there is also a powerful link between the parents' income and infants' health, for higher income means better nutrition, among other things. See Aaron Wildavsky, *Searching for Safety* 59-72 1988); Victor R. Fuchs, *How We Live* 31-40 (1983). Removing women from well-paying jobs (and the attendant health insurance), or denying women access to these jobs, may reduce the risk from lead while also reducing levels of medical care and the quality of nutrition. The net effect of lower income and less medical care could be a reduction in infants' prospects.[16] Mary E. Becker, *From* Muller v. Oregon to *Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1229-31 (1986).

Nothing in the record shows the net risks. When asked at oral argument whether Johnson attempted to determine net effects before adopting its policy, counsel said no. He continued, in effect: "If there is a greater risk, that's not our concern." A "not on *our* watch" position

[16] The majority says that "[t]his issue bears no relevance to Johnson Controls' employment practices", slip op. 32 n.28, because Johnson protected the salary and benefits of women transferred out of jobs in 1982. But Johnson does not offer women *excluded* from these jobs in 1983 or later the salary and benefits they could have earned in them, and it also does not protect the income and benefits of employees who because of the policy cannot exercise their seniority (bumping) rights to avoid layoffs.

is the bureaucrat's shelter and not becoming if, as Johnson so earnestly maintains, it is concerned about the welfare of unborn children. These helpless beings do not know or care about the source of risk; they would care only about its aggregate level. Surely Title VII does not allow an employer to adopt a policy that simultaneously makes both women and their children worse off.

Mediation through a Single Sex. Is the risk to the child transmitted by one sex only? If "the risk" is defined as risk caused by lead entering the fetus's blood via the placenta, it is by definition confined to one sex. But if we ask instead "Does the presence of lead in a parent's blood pose a risk to the fetus?", then the evidence conflicts. The broader perspective is the correct one when aggregate levels of risk are the proper concern.

Three affidavits in the record, and papers in medical journals, maintain that lead in the blood creates risks for offspring of both male and female employees. The American Public Health Association and other medical groups have filed a brief as *amici curiae* marshaling an impressive array of studies linking lead with injury to the male reproductive system, and thence to offspring. E.g., Christopher Winder, *Reproductive Effects of Occupational Exposures to Lead: Policy Considerations*, 8 NeuroToxology 411 (1987); Herbert L. Needleman & David Bellinger, *Commentary*, Environmental Research (1988). Most of the data come from animal studies, but some human studies suggest that the effects occur in our species too. OSHA concluded that lead in men as well as women is hazardous to the unborn. The medical surveillance guidelines published as an appendix to the agency's lead control regulations state:

> Exposure to lead can have serious effects on reproductive function in both males and females. In male workers exposed to lead there can be a decrease in sexual drive, impotence, decreased ability to pro-

> duce healthy sperm, and sterility. Malformed sperm (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur. Teratospermia has been noted at mean blood levels of 53 μg/100 g and hypospermia and asthenospermia at 41 μg/100 g. Furthermore, there appears to be a dose-response relationship for teratospermia in lead exposed workers. . . . [B]ecause of the demonstrated adverse effects of lead on reproductive function in both the male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 μg 100 g maximum permissible blood lead level in both males and females who wish to bear children.

29 C.F.R. Part 1910, pp. 833-34 (1987). Perhaps OSHA is wrong; its findings do not bind Johnson in this litigation. But its view has been sustained once after rigorous attention. *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980) (describing as "abundant" the evidence supporting the belief that lead injures the reproductive systems of both sexes and sustaining as rational OSHA's decision that the evidence does not justify excluding women from the workplace). Affidavits and professional articles describing the latest evidence also support OSHA's judgment. The district court could not properly reject it without holding a trial.

Least of all could a court reject it, as my colleagues do, on the ground that as a matter of law animal studies are not "solid scientific data", slip op. 33. The District of Columbia Circuit concluded that "virtually undisputed evidence [shows] that at 30 ug/100 g and above, men suffer . . . interference with their ability to produce normal sperm", 647 F.2d at 1249. The medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too "speculative", slip op. 33, to be the basis of conclusions about risks. Often animal studies are the best foundation for decision. The

Supreme Court has concluded that they may be used, e.g., *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 657 n.64 (1980) (plurality opinion). OSHA relied on these very animal studies when establishing its lead rules, as the D.C. Circuit held it may. 647 F.2d at 1257 & n.97. See also, e.g., *Simpson v. Young*, 854 F.2d 1429 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1489-90, 1492 (D.C. Cir. 1986), sustaining risk assessments based on animal studies. Indeed, on occasion animal studies *compel* responsible agencies to act. *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987).

Less Restrictive Alternatives. An employer cannot close employment opportunities to women in order to protect the next generation if some more modest alternative would do (nearly) as well at protecting the unborn. Johnson's policy has a striking sweep: *no* fertile woman can be hired for a job in which *any* employee has had a blood lead level exceeding 30 μg/dl *anytime* during the last year, or in *any* job that might lead to a promotion to such a job. As a practical matter, this means every industrial job at Johnson's battery plants. The firm advised its hiring offices to tell women that "we have no openings for women capable of bearing children". To state the policy is to reveal many less stringent options that might be almost as good at protecting the interests of children.

Women over 40 rarely have children. Why are they forbidden to work? (One of the plaintiffs, 50 years old and divorced when the suit was filed, had nonetheless been excluded from jobs covered by the policy.) Covering them reduces the lead risk to zero, but "zero" is not the only acceptable level.

Many workers in jobs in which some employee has a level exceeding 30 μg/dl have levels less than that. Only ⅓ of Johnson's industrial employees exceed the 30 μg/dl figure. The levels of lead in the blood depend not only

on lead in the air but also on personal hygiene. Some workers allow particles to remain on their clothes or person, staging points from which they can be swallowed. Why not allow a woman to enter jobs in which significant fractions of workers sustain levels less than 30 μg/dl, to see whether she can too? Why treat all women as unable to follow good industrial hygiene, or as unwilling to use a respirator, just because $\frac{1}{3}$ of the men have elevated levels of lead in the blood? Johnson replies that lead levels usually are greatest shortly after entering a new job, before the employee learns how to reduce the level; the women might become pregnant during these initial weeks or months. True enough, but again this answer assumes that the only acceptable level of risk is zero.

Some workers who start at entry-level jobs with low exposure to lead will be promoted to higher-lead jobs; others will not (or will leave before then). Johnson excludes women even from these safer jobs, although they pose no appreciable risk to offspring. Doubtless Johnson believes that unimpeded lines of progression make its operation more efficient, since it can invest more in training women in skills that are transferrable to new jobs within the firm. Yet this form of savings does not count under Title VII. Let us suppose that Johnson had light-lifting and heavy-lifting jobs, joined in a line of progression. Would the inability of many or even all women to perform the heavy-lifting job permit Johnson to exclude all women from the light-lifting job? The exclusion might be desirable from the perspective of business efficiency, but Title VII would not allow it. So, too, Title VII forbids a firm to exclude all women from a line of progression on the ground that some will drop out to have children, rendering their training worthless to the firm. Women have less attachment to the work force than men, making it privately rational for firms to invest less in training them for high-skill jobs; Title VII just as clearly

forbids firms to do this. What Johnson has done is little different, and at some cost to itself it can change the fetal protection plan to enlarge women's opportunities at no cost whatever in risk to the unborn.

III

The *Wright-Hayes* standard is the wrong one. Johnson needed to, and did not, establish that sex is a BFOQ for employment at its battery plants. Yet even given the majority's decision to adopt the *Wright-Hayes* standard, the plaintiffs are entitled to a trial. Seven judges of this court have analyzed the conflicting medical evidence and reached their own conclusions about its significance, conclusions at variance with those drawn by the American Public Health Association and the Occupational Safety and Health Administration from the same kind of evidence.[17] Judges may be astute students of medical findings, but the presence of thoughtful persons on the other side suggests caution—and at all events appellate judges should not be resolving scientific disputes.

This is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then

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[17] The *amici curiae* whose view of the evidence differs from that of the majority include the American Public Health Association, the American Society of Law and Medicine, the Planned Parenthood Federation of America, several toxicologists and physicians who have published scholarly papers on the subject (some of which Johnson relied on, to the consternation of the authors who appear before us to denounce its interpretation of their research), and Eula Bingham, a professor of environmental health who was also the Assistant Secretary of Labor for OSHA at the time that agency published its lead regulations. Whether we think these persons and groups right or wrong, we should not suspect them of insufficient devotion to the health and welfare of the next generation.

by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks. See note 7 above. Whether that would happen is of course a separate question; legal entitlements need not translate to action. But the law would allow employers to consign more women to "women's work" while reserving better-paying but more hazardous jobs for men. Title VII was designed to eliminate rather than perpetuate such matching of sexes to jobs.

Title VII requires employers to evaluate applicants and employees as individuals rather than as members of a group defined by sex. The statute has its costs, prenatal injuries are among these. Appeals to the "flexibility" with which the Supreme Court has allocated burdens of proof and persuasion get us nowhere. No amount of "flexibility" justifies sex discrimination without a BFOQ, unless by "flexibility" we mean a prerogative to disregard the statute when it requires decisions antithetical to our beliefs. Although my colleagues refer to many constitutional cases, such as *Rostker v. Goldberg*, 453 U.S. 57 (1981), for the proposition that sex discrimination sometimes is permissible, cases showing that Congress *may* authorize sex-based decisions hardly shows that in this instance it *did*. Title VII forbids rather than requires resort to sex as a basis of decision.

Risk to the next generation is incident to all activity, starting with getting out of bed. (Staying in bed all day has its own hazards.) To insist on *zero* risk, which the court says Johnson may do, is to exclude women from the industrial jobs that have been a male preserve. By all means let society bend its energies to improving the prospects of those who come after us. Demanding zero risk produces not progress but paralysis. Defining tolerable risk, and seeking to reduce that limit, is more useful—but it is a job for Congress or OSHA in conjunction with medical and other sciences. Laudable though

its objective be, Johnson may not reach its goal at the expense of women.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,

vs.

JOHNSON CONTROLS, INC.,
Defendant.

DECISION AND ORDER

[Filed Jan. 21, 1988]

This case presents the issue of whether a fetal protection policy which prohibits women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead [1] levels will rise above 30 micrograms violates Title VII of the 1964 Civil Rights Act. Defendant, Johnson Controls, Inc. ("Johnson Controls") has filed a motion for summary judgment. After carefully reviewing all the submissions from both parties and the law on this issue, it is the Court's conclusion that the fetal protection policy at issue does not violate Title VII, and the defendant's motion for summary judgment is hereby GRANTED.

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[1] A word frequently used by the experts is blood lead. Blood lead is a measure of the amount of lead that is present in the circulation where venous blood is drawn.

I. *Background Facts*

Defendant has seventeen plants in its battery division. Fourteen of these plants manufacture batteries. Lead is the principal active material used in batteries. It is the main ingredient in the paste which forms the plates of the batteries, and it forms the structure for all the conductive elements in the battery for transmitting current.

On February 25, 1985, as a result of a stipulation between the parties, the Court certified the following class: all past, present and future production and maintenance employees employed in bargaining units represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and/or one of its Local Unions at Defendant's Battery Division plants located in Garland, Texas; Holland, Ohio; Fullerton, California; Owosso, Michigan; Louisville, Kentucky; Texarkana, Arkansas; Bennington, Vermont; Middleton, Delaware; and Atlanta, Georgia, who have been and continue to be affected by Defendant's Fetal Protection Policy implemented in 1982.

The policy at issue was implemented in 1982 by the defendant. The policy excludes women who are capable of bearing children from working in jobs where their blood lead level will rise above 30 micrograms. Women are presumed capable of bearing children until they medically prove contrary. Women who are required to transfer out of jobs because of the policy are paid medical removal protection benefits to compensate for lost earnings. Women who are not in positions where their blood lead levels will not rise to 30 micrograms are prohibited from transferring into such positions.

The plaintiffs allege that this policy discriminates against both women and men. Based on this policy plaintiffs allege that there is sex discrimination in recruitment and hiring, job assignments, wages, promotions and transfers within the bargaining unit, seniority, overtime,

layoff and recall, demotions, on-the-job training, maternity policies, on-the-job harassment, fringe benefits, and health and safety conditions.

There is no dispute between the parties regarding the fact that excessive exposure to lead can result in significant harm to persons. There is a dispute, however, on the issues of whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females, as opposed to male workers. There is also a dispute as to whether a fetus is more sensitive to lead than a postnatal child. Depositions and affidavits of experts have been submitted by plaintiffs and defendant, and the Court has closely reviewed those documents. Following is a brief summary of the testimony of the experts.

A. *Expert Opinions*

Dr. Anthony R. Scialli is a practicing physician and director of the Reproductive Toxicology Center. The Center serves as a source of information on the potential reproductive toxicity of environmental and physical agents. Dr. Scialli holds the opinion that because a fetus undergoes extremely rapid development of the internal nervous system during gestation, the fetus is even more sensitive to the effects of lead than a young child. Dr. Scialli further stated that damage of the central nervous system includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities which may be permanent. According to the affidavit, Dr. Scialli is aware of no studies which show that male blood lead levels of up to 50 micrograms results in any abnormality of offspring, and further that lead does not cause any change in the sperm that would be transmitted to offspring and result in abnormality in the offspring. Finally, the affidavit states that a man with a blood lead level of 50 micrograms would not have an increased risk of fathering a child with abnormalities.

Dr. J. Julian Chisolm who is a pediatrician and director of the Lead Program at the John F. Kennedy Institute set forth the following opinion:

> During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation. The concentration of lead in the fetal tissue increases rapidly during the last trimester of pregnancy. At birth, the fetus generally has the same blood lead level as the mother. However, the fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child. This is particulary true during the latter part of the gestation period when the central nervous system of the fetus is developing very rapidly and is extremely susceptible to the toxic effects of lead. Medical studies released in the last year or two out of Boston, Cincinnati and Port Pirie, South Australia suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents [a] grave risk of permanent harm to the central nervous system of the fetus. The risk of harm to the fetus increases proportionately with the increase of blood lead levels over 10 micrograms. Such harm includes stillbirth, reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral disorders.
>
> There is no medical evidence that lead exposure to the adult, male or female, has any adverse effect on the offspring. Rather, the available medical evidence establishes that it is the exposure directly to the fetus, through the pregnant woman, which causes harm to the offspring.

Likewise, the affidavit of Paul B. Hammon, Professor of Environmental Health at the University of Cincinnati and director of a study currently being conducted in Cincinnati of the effects of lead exposure on children, stated

that he was unaware of any human studies which conclude that blood lead levels of up to, and even exceeding, 50 micrograms in the adult male will cause any demonstrable effect on the development of the fetus.

The deposition of Seymore Legator, professor and director of the division of environmental toxicology was submitted wherein Professor Legator states that there is "no question that lead is hazardous to the fetus by embryo exposure" and that children are very sensitive to lead. Professor Legator also stated that lead poses a threat to both men and women, but it is still unknown about male sensitivity, but he recognized that there is a problem and that lead probably causes a genetic lesion during spermatogenesis.

Another physician, M. Donal Whortin, is the Senior Occupational Physician/Epidemologist for a company that conducts research in the areas of occupational and environmental health and is a primary medical consultant for a number of companies. Dr. Whortin holds the opinion that "the current OSHA lead standard of 50 micrograms per deciliter of whole blood should generally protect adults of either sex from significant adverse effects in the various adult systems." Dr. Whortin was a coinvestigator in a 1981 study which compared the quality of the semen of lead exposed workers with non-exposed males. The study discovered no changes in the semen quality of lead exposed workers. Nevertheless, Dr. Whortin stated that recent medical studies have shown that a fetus' central nervous system can be injured by exposure to blood lead levels of 10 micrograms. Dr. Whortin concluded that the central nervous system of the fetus and not the reproduction systems of the male or female worker is at greatest risk.

The testimony of Charles W. Fishburn was also submitted for purposes of the motion. Dr. Fishburn is a physician and Assistant Clinical Professor at the University of Wisconsin. Dr. Fishburn is certified in occupational medicine. Occupational medicine involves the study of the relationships of injury and disease caused by chemical exposures in occupations. He states that children are particularly sensitive to lead because children do not have a barrier between the brain and the blood. Further, children develop a barrier around the age of five. Until the barrier is developed, if children ingest lead, they can be poisoned immediately. The child also can go into convulsions resulting in damage to the central nervous system.

In a fetus, the central nervous system is one of the first systems that develops and the first to be affected. A fetus gets its blood from the mother and there is no way, according to Dr. Fishburn, to protect a fetus when it is overexposed to lead. Dr. Fishburn states that damage to the central nervous system is apparently permanent.

Michael Silverstein, an Occupational-Health Physician in the Health and Safety Department of the United Auto Workers, is of the opinion that there is no evidence that reproductive risks are different for men and women at equal blood-lead levels. Furthermore, Dr. Silverstein states that "the toxic effects of lead exposure on human adults is similar and equivalent in impact to that observed in children at equivalent exposure levels." Dr. Silverstein discussed one study published in 1972, Hilderbrand, where it was found that male rats with blood levels between 14 and 26 resulted in impotence and a decrease in sperm mobility. Dr. Silverstein stated that it could be speculated that an abnormal sperm could carry damaged genetic material which could result in damaged offspring or functional infertility.

Assistant Professor of Occupational Medicine at the University of Michigan School of Public Health, Kelly Ann Brix, states the conclusion, based upon a review article, that there is a clear effect of lead upon the male reproductive tract in mammals.

Ellen Silbergeld, a toxicologist and a senior scientist for the Environmental Defense Fund, holds the opinion that all persons should not be exposed to lead levels above 12 micrograms.[2] Silbergeld also states that there is no evidence that a fetus is more sensitive than a post-natal child. Further, in animals, Silbergeld states, that high doses of lead in the first trimester can cause spontaneous abortion of an embryo. Silbergeld also stated that "a woman may be exposed to lead early in pregnancy and deficits noted in the child after birth, but those deficits might have been associated with the on-going exposure which occurred in the late stages of pregnancy . . . [because] for all purposes there is a continuing exposure to lead even after removal from sources of lead. . . ." Silbergeld estimated that if a person, after exposure to lead, is placed in a lead-free environment, the turnover of lead is about 100 days, "so within a year or so there would be a reduction in lead." This time estimate according to Silbergeld is accurate in a lead-free environment, but in the absence of a lead-free environment, there is a continuing exposure to lead.

II. *Prior Law*

There are essentially two types of Title VII cases: Disparate treatment and disparate impact. Disparate treatment occurs when an employee has been treated less favorably because of sex. There are two types of disparate treatment cases: facial and pretextual. "Facial discrimination occurs when an employer adopts a policy that explicitly treats some employees differently from others on the basis of race, religion, national origin, or gender (pregnancy)." *Haynes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). The only defense to a charge of facial dis-

[2] Silbergeld also states that "I think the blood leads that are called for monitoring are much too high, and I also don't understand why it applies only to women."

crimination is a bona fide occupational qualification (BFOQ). A second theory under disparate treatment occurs when the employer adopts a facially neutral policy, but which is a pretext for discrimination. A disparate impact suit exists when although a policy is neutral, it has a disparate impact on a protected class. Discriminatory motive is not required, and the defense to an allegation of disparate impact is business necessity.

Only three jurisdictions have reviewed Title VII actions involving the health of the fetus.[3] The Fourth Circuit Court of Appeals was the first circuit court to address the fetal vulnerability program in *Wright v. Olin Corp.*, 697 F.2d 1172, 1177 (4th Cir. 1982). Olin Corporation instituted a fetal vulnerability policy which restricted fertile females from jobs which required contact with toxic chemicals. The Fourth Circuit determined that the disparate treatment analysis was inappropriate for this particular case because under disparate treatment, the plaintiff must show that the employer intended to treat the class less favorably. The *Wright* court stated:

[3] Despite a lack of case law on this issue, many legal writers have addressed the issue. *See generally*, Comment, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection—But Can They Succeed?*, 20 J. Marshall L. Rev. 747 (1987); Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L. Rev. 353 (1987); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L. J. 577 (1986); Timke, *Exploring the Limits of Legal Duty: A Union's Responsibilities with Respect to Fetal Protection Policies*, 23 Harv. J. on Legis. 159 (1986); Comment, *Fetal Protection Programs under Title VII—Rebutting the Procreation Presumption*, 46 U. Pitt. L. Rev. 757 (1985); Note, *Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C.L. Rev. 1067 (1984); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641 (1981).

> Here the claim is that the intention to "treat less favorably" is manifest in the very nature of the program and the factual defense is not truly aimed at rebutting that indisputable fact but at justifying it on the basis that the purpose behind it was benign in relation to the claimant's sex.

697 F.2d at 1185 n.20. The court stated that the disparate impact theory with the business necessity defense was appropriate. The court held that the fetal protection policy establishes a prima facie case of discrimination. The court went on to find, however, that a business necessity defense existed in this situation by analogizing the fetus to invitees and licensees who are legitimately on the business premises. The court stated that "the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon the employer's premises." 697 F.2d at 1189.

The Fifth Circuit was the next circuit to address the issue of fetal protection in *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982). In *Zuniga*, a female x-ray technician was terminated from employment because of the effects of exposure of the fetus to x-ray radiation, and the concern of future liability of the hospital to the child. The Fifth Circuit found that the plaintiff rebutted the business necessity defense by showing that the hospital failed to utilize less discriminatory means. *Id.* at 992.

The next circuit to address this issue was the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). *Hayes* also involved a plaintiff who was a female x-ray technician and who was fired because she was pregnant. The Eleventh Circuit reviewed the case under both the disparate treatment analysis and the disparate impact analysis. Under the disparate treatment analysis, the

court did not find that an analysis of pretextual discrimination was appropriate because the plaintiff was fired because of her pregnancy. A BFOQ defense could not be established because there was no evidence that plaintiff's pregnancy would interfere with her ability to perform her job, and the hospital failed to provide evidence that the level of radiation to which the plaintiff would be exposed posed an unreasonable risk of harm to the fetus.[4]

The Court, however, found that a facial discrimination analysis was proper. A presumption of facial discrimination applies when the policy at issue only applies to women. "That presumption may be rebutted, however, if the employer can show that although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees." *Hayes*, 726 F.2d at 1548.

The *Hayes* court went on to state that even if the employer proves that the policy is justified in a scientific basis and is not required to protect the offspring of male employees, the policy still has a disproportionate impact on women; only women are excluded from the jobs. The *Hayes* court stated that the plaintiff established an automatic case of disparate impact for which the defendant must raise a business necessity defense.

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[4] The *Hayes* court further noted:

> Because the Hospital failed to prove its policy was necessary we need not reach the factual issue of whether x-ray radiation affects the offspring of employees only through pregnant women, or whether similar effects can occur from exposure to males. Documents cited by amici do suggest that radiation induced mutations can pass to offspring from male sperm, but neither party developed on this issue at trial.

Hayes v. Shelby Memorial Hosp. 726 F.2d 1543, 1552 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984). The parties in this case have, however, submitted affidavits and depositions regarding the effects males exposed to lead and their offspring.

The business necessity defense is generally related to job performance. The *Hayes* court recognized that fetal protection does not have any relation to job performance. The court, however, did not find that the business necessity defense does not apply, but rather found that "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1552-53 n.15. The court went on to further hold that the business necessity defense "automatically" applies because at the point where the court undertakes a disparate impact analysis, the employer "has *already* proved—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men." *Id.* at 1553. If a business necessity defense exists, the burden then shifts to the plaintiff to show that there are no "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would better accomplish the purposes with a less adverse impact on one sex." *Id.* In brief three elements were set forth by the *Wright* court for reviewing a fetal protection policy:

> (1) that a substantial risk of harm exists;
>
> (2) that the risk is borne only by members of one sex; and
>
> (3) that the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex.

Id. at 1554. If these three elements are met, the policy does not violate Title VII.

III. *Analysis*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A factual dispute will not preclude summary judgment unless the fact is "outcome determinative according to the governing law." *Reardon v. Wroan*, 811 F.2d 1025, 1027 (7th Cir. 1987).

A. *Disparate Treatment*

Reviewing this case under a disparate treatment analysis results in the conclusion that the plaintiffs have established a prima facie case of discrimination because the fetal protection policy excludes women from positions which men are not excluded from. The *Hayes* court stated that there is a "*presumption* that if the employer's policy by its terms applies only to women, then the policy is facially discriminatory." 726 F.2d at 1548. This presumption is rebutted by demonstrating that there are "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary for the safety of the unborn children, that fertile women workers be appropriately restricted from exposure to those hazards and that its program is effective for the purpose." *Wright*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548.

In the present case, there is a disagreement among the experts regarding the effect of lead on the fetus and the effect of lead on male and female reproduction. This dispute, however, is not outcome determinative. The Fourth Circuit stated:

> To establish the requisite degree and cast of the risk of harm, it is not necessary to prove the exist-

> ence of a general consensus on the points within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

The expert opinion in this case demonstrates that there is a considerable body of opinion which holds that lead is hazardous to the fetus through embryo exposure, and a fetus that is exposed to lead carries the significant risk that the central nervous system will be damaged. Further, a significant opinion exists which holds that the fetus cannot be protected when it is overexposed to lead from the mother's blood. Although plaintiffs state that today "reproduction is now largely discretionary," Dr. Chisolm stated that many pregnancies are unplanned. It is very likely that a woman could be pregnant without being aware of it. If this women had a blood lead level of above 10 micrograms, her child could be born with abnormalities even if, after she discovers that she is pregnant, she removes herself from the lead environment because the fetus has been exposed to lead during early development when the central nervous system was developing. Also, lead remains in the body for a significant period of time. Furthermore, lead builds up in the blood, soft tissues, and bones. If the lead leaves the blood and soft tissues, lead still remains in the bones; it takes even longer for the lead to leave the bones. According to the experts, it takes about two or three times as long for the blood leads to decrease as it did for such blood levels to increase.

Further, a fetus that has been exposed to lead may be stillborn. The fetus may have a reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral

disorders. This is a significant and unreasonable risk of harm to the fetus. The fetal protection policy is necessary. The employer has carried its burden of "showing that the body of opinion believing that significant risk exists is so considerable 'that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.'" *Wright*, 697 F.2d at 1191.

The next step to consider is whether the hazard does not apply to the offspring of male employees. In *Hayes*, the court stated, "[i]n those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women." 726 F.2d at 1549.

Expert opinion has been provided which holds that lead also affects the reproductive abilities of men and women. Some experts hold that these effects are as great as the effects of exposure of the fetus. Although the Court believes that men, women, and fetuses should be protected from lead exposure, there is expert opinion that fetuses are subject to a greater risk because the fetuses central nervous system is developing, and further, a fetus could be exposed to lead without the mother's knowledge. One legal writer has stated that "an employer may be justified in excluding all women of childbearing capacity from working with compounds that cause reproductive injury to the female worker prior to her knowledge of pregnancy." Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L.Rev. 353, 370 (1987). Although adults of both sexes may be subject to equivalent susceptibility of reproduction hazards, a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults. The Court simply cannot overlook this possibility of severe harm only to the fetus. As

a concern for society and future generations this Court must uphold the fetal protection policy. The fetus deserves special protection from lead. If women always knew when they were going to become pregnant, the mother could remove herself from the lead environment; this predictability does not always occur with accuracy. "Unlike abortion, in which a woman makes a knowing decision to end fetal life, workplace hazards may harm a worker's reproductive system or unborn offspring without his or her knowledge or consent." Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect to Fetal Protection Policies*, 23 Harv.J. on Legis. 159, 167 (1986). Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory.[5] Further, plaintiffs have failed to establish that there is an acceptable alternative policy which would protect the fetus. Perhaps with the improved development of pregnancy testing, an alternative may develop, but even if a pregnant woman is removed from lead exposure once she is aware of the pregnancy, the lead level does not decrease as quickly as it built up; lead remains in the body for some time. Thus, the fetus would be exposed to lead even if the mother is removed from the lead environment.

Additionally, based upon the affidavits submitted, it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels. Since 1978,

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[5] Because this Court has determined that the lead fetal protection policy is not facially discriminatory, this Court does not have to undertake a bona fide occupational qualification's (BFOQ) analysis. "Under traditional analysis, the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job, duties that Title VII defines as 'necessary to the normal operation of the particular business or enterprise.'" *Hayes*, 726 F.2d at 1549. Although not required to address, this Court merely notes that an employee's job performance would not be affected by pregnancy.

the defendant has spent approximately 15 million dollars on environmental engineering controls in its Battery Division Plants. Although plaintiffs state that "in the opinion of Toxicologist Ellen Silbergeld, the technology exists to reduce blood lead levels below 15 micrograms," Ms. Silbergeld's deposition transcript reveals that she is not aware that there is technology which exists that would reduce blood lead levels at Johnson Controls to 12 micrograms. Plaintiffs have failed to demonstrate that acceptable alternative policies exist.

B. *Disparate Impact*

Although the fetal protection policy is facially neutral, it has a disproportionate impact on women; thus, a prima facie case of disparate impact exists. The employers only defense in this situation is a business necessity defense, but "[o]ne problem with business necessity as defined under traditional Title VII analysis, but applied in the context of an employer's fetal protection program, is the requirement that the employer's policy be related to job performance because fetal protection does not in a strict sense have anything to do with job performance." *Hayes*, 726 F.2d at 1552. The *Hayes* court expanded the business necessity defense to cover the fetal protection case because "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1553. This Court agrees. There is a business necessity to protect fetuses. The fetus, from exposure to lead, faces a substantial risk of harm, and this exposure exists only for pregnant women. Men simply cannot expose a fetus to lead in the same way women can. The *Wright* court analogized fetuses to licensees and invitees, and stated that "[c]ertainly the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises." 697 F.2d at 1189. In view of the

fact that a significant risk exists for fetuses exposed to lead, the fetuses' safety cannot be ignored. A business would not expose its customers to lead. Furthermore, although not of primary importance, a business should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed to lead. Thus, the business necessity defense applies to a lead fetal protection policy. There is a general societal interest in protecting the health of fetuses and children.

C. *Toxic Substance Control Act (TSCA)*

Plaintiffs argue that although there is a societal interest in fetal safety, the obligation of protecting society's interest *has* been delegated to the Environmental Protection Agency in the TSCA. The TSCA requires producers of chemicals to report to the EPA information about substances which pose a substantial risk. The EPA is required to take regulatory action within 180 days after receiving information that a substantial risk may exist. If the EPA determines that a substantial risk exists, the EPA can regulate the substance. One commentator has criticized the effectiveness of the Act:

> Despite its broad scope, TSCA's usefulness in dealing with fetal toxins, teratogens, and mutagens has been limited. The EPA has substantial discretion under the statute, and the agency has tended to exercise this discretion to avoid active regulation. The EPA has announced that it intends to regulate at most two or three substances per year, with relevant studies taking up to two years per substance to prepare. The Office of Management and Budget under the Reagan administration has been relentless in criticizing the EPA's modest efforts to regulate dangerous chemicals. Consequently, fetal toxins, mutagens, and teratogens have escaped regulatory review.

> When the EPA does examine a chemical, it may consider the availability of substitutes and the economic consequences of regulation before making a pre-regulation determination that the chemical poses an "unreasonable risk." Furthermore, the promulgation of regulations involves consideration not only of their economic consequences but also of the available level of technology. A consideration of both these factors would probably lead to an acceptance of hazards that may not pose significant risks to employees but do pose grave risks to their unborn children.

Timko, *supra*, p. 16, at 172. Based upon the foregoing, the Court is not persuaded that the TSCA is protecting fetuses from lead exposure. Furthermore, eliminating the use of lead in battery production has not yet been achieved. The use of lead is still necessary at this point. The company is, however, continuing to "study, develop, and implement engineering controls to reduce the lead exposure and blood lead levels of all employees." Beaudoin Affidavit, ¶ 17. Although no evidence has been presented to the Court demonstrating that the EPA has reviewed the lead situation at issue here, it is unlikely that the EPA would prevent the use of lead in the absence of a substitute. Further, because the TSCA is gender neutral, it would fail to protect the fetus which faces a significant risk from lead exposure because male and female are treated equally under the Act.

IV. *Conclusion*

Society has an interest in protecting fetal safety. Lead poses a substantial risk of harm to the fetus. This risk is born only by women who are pregnant or will become pregnant. The plaintiffs have not shown that there is an acceptable alternative that would have a lesser impact on females. Johnson Controls fetal protection policy does not violate Title VII. Stillbirths, reduced birth weight and gestational age, and retarded cognitive development

are abnormalities too serious for this Court to find unimportant.

Defendant's motion for summary judgment is hereby GRANTED.

SO ORDERED this 21st day of January, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-0472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,
v.

JOHNSON CONTROLS, INC.,
Defendant.

ORDER

It is hereby ordered that the opinion issued on January 21, 1988, in the above-captioned case is amended as follows: On page 2 of the slip opinion, line 30, the typographical error is corrected to read micrograms.

On page 2, lines 24-26 are amended to read as follows: Women who are in positions where their blood lead levels do not rise to 30 micrograms are prohibited from transferring into positions where their blood lead levels will rise above 30 micrograms.

Page 13, lines 12-17 are amended to read as follows: That there are "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards the workplace make necessary, for the safety of the unborn chiidren, that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for the purpose."

SO ORDERED this 24th day of February, 1988, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case Number 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,

v.

JOHNSON CONTROLS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that the fetal protection policy at issue does not violate Title VII, and defendant, Johnson Controls, Inc.'s, motion for summary judgment is granted.

Date January 21, 1988

SOFRON B. NEDILSKY
Clerk

/s/ [Illegible]
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 28, 1989

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL A. KANE, Circuit Judge

No. 88-1308

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs-Appellants,

and

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Intervening Plaintiff-Appellant,

vs.

JOHNSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for
the Eastern District of Wisconsin
No. 84 C 472—Robert W. Warren, Judge

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed September 26, 1989. Costs are hereby awarded to the defendant-appellee and against only the plaintiff-appellant, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-437

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, UAW, *et al.*,
Petitioners

v.

JOHNSON CONTROLS, INC.,

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 12, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 8 day of December, 1989.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-437

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UAW, *et al.*,

Petitioners

v.

JOHNSON CONTROLS, INC.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, further extended to and including January 29, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of January, 1990.

APPENDIX G

NOTICE

1. *SUBJECT*: Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.* —— F.2d ——, 51 EPD ¶ 39,359 (7th Cir. 1989).

2. *PURPOSE*: This document discusses the decision in *Johnson Controls* in light of the Commission's Policy Guidance on Reproductive and Fetal Hazards and clarifies the Commission's position on the proper legal analysis to be applied to charges challenging fetal protection policies.

3. *EFFECTIVE DATE*:

4. *EXPIRATION DATE*: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR*: Title VII/EPA Division, Office of Legal Counsel.

6. *INSTRUCTIONS*: File behind Exhibit 624C of the EEOC Compliance Manual, Volume II, Section 624, Reproductive and Fetal Hazards. To be read in conjunction with the interim Policy Guidance on Fetal and Reproductive Hazards, dated October 7, 1988.

7. *SUBJECT MATTER*:

I. The Decision

In *United Auto Workers v. Johnson Controls*, —— F.2d ——, 51 EPD ¶ 39,359 (7th Cir. 1989), a Title VII action challenging the company's fetal protection policy, the Seventh Circuit, in an en banc decision by a vote of seven to four, affirmed the district court's grant of summary judgment in favor of Johnson Controls.

Johnson Controls maintains a fetal protection policy for its battery manufacturing division. That policy is "designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure." *Johnson Controls*, 51 EPD at 59,469. It provides that "women with childbearing capacity [1] will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive." *Id.* at 59,470.

In considering the evidence on whether lead poses a health risk to the offspring of Johnson's female employees, the Seventh Circuit noted that "both the UAW and Johnson Controls agree on appeal that a *substantial* health hazard to the unborn child in the womb has been established." *Id.* at 59,472 (emphasis in original). After reviewing the record, the court concluded that "[t]he overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm." *Id.* at 59,475.

Turning to the issue of the proper Title VII defense available to Johnson Controls to justify its fetal protection policy, the court reviewed the decisions of two courts of appeal [2] and EEOC's Policy Guidance on Reproductive and Fetal Hazards (approved October 3, 1988) (hereinafter referred to as "Policy Guidance on Fetal Hazards"). Both of the other courts of appeal and the EEOC had concluded that a business necessity defense may be utilized, and the Seventh Circuit agreed with that conclusion. The Seventh Circuit described the other two courts' analyses of the defense in fetal protection cases as requiring

[1] Johnson Control's policy defines "women of childbearing capacity" as "[a]ll women except those whose inability to bear children is medically documented." *Johnson Controls*, 51 EPD at 59,470, n.8.

[2] The two decisions referred to by the court were *Wright v. Olin Corp.*, 697 F.2d 1172, 30 EPD ¶ 33,257 (4th Cir. 1982), and *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 33 EPD ¶ 34,219 (11th Cir. 1984).

(1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. In addition, the plaintiff may present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn. The court in *Johnson Controls* stated that it was convinced that the business necessity defense "balanced the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." *Id.* at 59,479.

Proceeding to the question of whether the business necessity defense could be utilized to sustain Johnson Control's fetal protection policy, the Seventh Circuit considered the recent Supreme Court decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 50 EPD ¶ 39,021 (1989). In that case the Supreme Court held that, once a *prima facie* case of disparate impact has been established, the employer carries the burden of producing evidence of business justification, but the burden of persuasion remains with the plaintiff. *Id.* at 2126. The Seventh Circuit applied *Wards Cove* to the case before it, placing the burden on UAW to disprove business necessity. For summary judgment purposes, the question confronting the court was whether "UAW has established a genuine issue of material fact concerning any of the elements of the business necessity defense upon which it bears the burden of persuasion." *Johnson Controls*, 51 EPD at 59,480.

On the question of whether there was a substantial risk of harm to the unborn child, the court found no genuine issue of material fact since both parties agreed on this point. As to the question of whether the risk of transmission of lead exposure to unborn children is substantially confined to fertile female employees, the court concluded that "the evidence of risk to the unborn child resulting from exposure of the father . . . is, at best,

speculative and unconvincing." *Id.* at 59,481.[3] Finally with regard to adequate but less discriminatory alternatives, the court stated that UAW had failed to persuade it that "less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates." *Id.* at 59,483.

After concluding that Johnson Controls had established the business necessity defense and would thus be shielded from liability, the Seventh Circuit stated that it was "also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense." *Id.* at 59,484. The court recognized that the BFOQ exception to Title VII is extremely narrow, but said that the employer does not automatically lose whenever it must establish this defense. *Ibid.* Noting that Johnson Controls' business is "unique" because it requires the use of an extremely toxic substance, the court found that industrial safety is legitimately part of the "essence" of Johnson's business and that the fetal protection policy was directly related to industrial safety. In determining that Johnson's fetal protection policy was

[3] In reviewing the expert testimony on risk of harm to unborn children through male exposure to lead, the court stated that "Johnson Controls' experts, without exception, testified that a male worker's exposure to lead at [OSHA approved] levels . . . did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." 51 EPD at 59,481. While UAW witnesses testified that animal studies had demonstrated a possible risk of genetic damage to human offspring as a result of male lead exposure, Johnson's experts took the position that the results of these studies were not scientifically established as being applicable to humans. The court noted that UAW had not presented any medical evidence of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure, and stated that "it is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems." *Id.*

reasonably necessary to further industrial safety, the court stated that "'[m]ore is at stake . . . than an individual woman's decision to weigh and accept the risks of employment,'" since "[a] female's decision to work in a high lead exposure job risks the intellectual and physical development of the baby she may carry." *Id.* at 59,488, *quoting*, *Dothard v. Rawlinson*, 433 U.S. 321, 335, 14 EPD ¶ 7632 (1977).

Thus, in summary, the Seventh Circuit found that a business necessity defense should be applied to a Title VII challenge to a fetal protection policy. It also found that Johnson Controls could demonstrate such a defense and that UAW failed to prove a genuine issue of material fact with respect to the absence of such a defense. Finally, the court held that even if the BFOQ defense is applied, Johnson Controls had shown its fetal protection policy reasonably necessary to industrial safety, which was part of the essence of its business.

Four judges, Cudahy, J., Posner, J., Easterbrook, J. and Flaum, J. filed three separate dissents. Judge Cudahy concluded that the only proper defense was BFOQ, that it would be "difficult" to establish the defense but that the employer should have the opportunity to try. 51 EPD at 59,491.[4] He also determined that the "painful complexities [of the case] are manifestly unsuited for summary judgment." *Id.* at 59,492. Judge Posner, too, thought that BFOQ was the only applicable defense and that the case should not have been decided on summary judgment. *Ibid.* Like Judge Cudahy, he believed that, while the BFOQ defense is narrow, the employer might be able to establish that an exclusionary policy was "reasonably necessary to the normal operation of the business" and that it should have the opportunity to try. *Id.* at 59,493.

[4] He also stated that he "would be pleased to join almost all of Judge Easterbrook's eloquent dissent except for its [conclusion that the employer could never prevail using the BFOQ defense]." *Ibid.*

Judge Easterbrook wrote a lengthy opinion joined by Judge Flaum. Like the other dissenters, he opined that BFOQ was the only proper defense to Johnson Control's policy. Unlike the others, he thought protecting offspring could never be a BFOQ because, he said, the Pregnancy Discrimination Act "makes distinctions based on women's ability to bear children sex discrimination" and such distinctions can only be justified if the excluded women are dissimilar from others in their ability or inability to perform the functions of the job. *Id.* at 59,498. He further stated that even assuming that the *Wright-Hayes* business necessity approach is the correct one, it was inappropriate to apply *Wards Cove* and to shift the burden of proof to the plaintiff and that there were material disputes making the case unsuitable for summary judgment. *Id.* at 59,503.

II. Analysis

a. Legal Standards

In its interim guidance, the Commission did not contemplate the Seventh Circuit's application of the *Wards Cove* business necessity standard, imposing on the plaintiff the burden of disproving business necessity. The court's approach represents a significant departure from the analytical framework previously developed by the Commission in its Policy Guidance on Reproductive and Fetal Hazards, dated October 7, 1988.[5] In *Wards Cove*

[5] Under the analysis of the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), a case upon which the Seventh Circuit relied, the burden of proof would remain with the employer to demonstrate at least that there is a substantial risk of harm to the fetus that is only mediated through women. The *Hayes* court stated that fetal protection policies must be presumed to be facially discriminatory. Adverse impact analysis would apply only if the employer rebuts the presumption of facial discrimination by proving that the hazard applies exclusively to women since the policy could then be viewed as neutrally protecting all employees' offspring but adversely affecting only women. Thus,

the Supreme Court considered the business necessity defense as it arises in a traditional adverse impact case, in which a facially neutral policy impacts on a protected group. The Court clarified its view that the burden is on the plaintiff at the final stage of proof in such a case to prove that the neutral policy or practice does not serve a legitimate employment goal of the employer. 109 S. Ct. at 2125-26. Fetal protection policies, however, are not neutral rules to which adverse impact analysis applies. Instead, as stated in the Commission's Policy Guidance, policies which exclude only women constitute *per se* violations of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law. *See* Policy Guidance at 4 n.9, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Indeed, in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795, 49 EPD ¶ 38,936 (1989), a mixed motive case, the Court cited the leading fetal protection cases, *Hayes* and *Wright*, cited above at n.2, as illustrative of its longstanding assumption "that if an employer allows gender to affect its decision making process, then *it must carry the burden of justifying its ultimate decision.*" 109 S.Ct. at 1789 (emphasis added).

The Commission followed the lead of the only courts of appeals that had addressed the question in concluding that the business necessity defense applies, stating that "[t]hese cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." Fetal Hazards Policy Guidance at 4. We did not mean to suggest that a fetal protection policy fits within the category of an adverse impact case. (*See Johnson Controls*, 51 EPD at 59,493 (Posner, J., dissenting) ("this legerdemain is as unnec-

Wards Cove would not apply unless the employer first carries its burden of proving that there is a substantial risk of harm that is substantially confined to fertile or pregnant women.

essary as it is questionable"[6]. Thus, in the Commission's view, *Wards Cove* should not apply to the analysis of the defendant's burden of proving business necessity in a fetal protection case.

The majority's application of *Wards Cove* to a facially discriminatory policy has convinced the Commission that the hybrid approach to fetal protection cases is problematic. As Judge Easterbrook said:

> [W]hen the EEOC issued its policy statement, . . . "[b]usiness necessity" and "BFOQ" were not so distinct. [After] *Wards Cove*, however, . . . the *Wright-Hayes* approach has been watered down. The court's "adoption" of *Wright*, *Hayes*, and the EEOC's policy statement is thus in practice more favorable to employers that the Fourth and Eleventh Circuits (and the EEOC) anticipated their approach would be. The plaintiff won in *Hayes*; she would lose under [the] majority's approach.

51 EPD at 59,493 (emphasis in original). In the interim Fetal Hazard Policy Guidance at 4 n.10, the Commission said that a BFOQ analysis is arguably applicable. Given the Seventh Circuit's uncritical application of the *Wards Cove* adverse impact burdens to a factually distinct claim of facial discrimination, we now think BFOQ is the better approach. As the *Johnson Controls* dissenters point out, it is more consistent with Title VII's structure and purpose to allow a defendant in a case challenging a facially discriminatory fetal protection policy only the statutory defense of proving that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). 51 EPD at 59,492 (Cudahy, J.); *id.* at 59,492-93 (Posner, J.); and *id* at 59,499-500 (Easterbrook, J., and Flaum, J.).

The question, then, is whether and to what extent an employer can establish a BFOQ defense in these cases.

This will ultimately be matter of judicial interpretation of the language of the BFOQ provision. The *Wright* and *Hayes* courts "concluded that [fetal protection] policies can never satisfy the stringent requirements of the occupational qualification defense." 51 EPD at 59,493. Judges Easterbrook and Flaum took a similar view. *Id.* at 59,500. For purposes of its investigations, and as a matter of public policy, the Commission is unwilling to say that no possible defense is available to an employer that has a fetal protection policy.[6] Rather, the Commission's position is best reflected by Judge Cudahy's observation that "[i]t may (and should) be difficult to establish a BFOQ [in fetal hazard cases] but I would afford the defendant an opportunity to try". *Id.* at 59,491.[7]

In applying the BFOQ defense to these cases, we caution that the defense is written and should be read narrowly. *See* 51 EPD at 59,493 (Posner, J., dissenting). It imposes a threshold requirement that the employer must state a reasonably necessary business objective for its fetal protection policy. While Judge Easterbrook does not think fetal protection has anything to do with Johnson Controls' ability to make batteries, *id.* at 59,493, Judge Posner concludes that the "normal operation" of a business can incorporate the employer's legitimate concerns

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[6] Every court to have addressed the question has allowed the employer the opportunity to justify its policy. The Commission's investigatory policy must reflect this reality. To apply the Easterbrook approach to Commission charge processing would be to prepare cases inadequately for litigation.

[7] There is, however, considerable merit to Judge Easterbrook's observation that allowing an employer the opportunity to justify a sex discriminatory fetal protection policy embroils the Commission and courts in scientific conflicts that they are ill equipped to properly resolve. 51 EPD at 59,501-02. Title VII and the institutions which enforce it were designed to eliminate employment discrimination, not to evaluate evidence concerning workplace safety. Such evaluations are better left to agencies with appropriate expertise such as OSHA or the EPA.

for the safety of others.[8] As he says, "It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." 51 EPD at 59,493. Therefore, the Commission concurs with Judge Cudahy's observation that the employer "may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making." 51 EPD at 59,492 n.1.

The employer must show that protection of third parties from risk is "reasonably necessary to the normal operation of the particular business."[9] One cannot merely assume, for purposes of analysis of a Title VII discrimination claim, that containment of any hazard, however improbable or inconsequential, is "reasonably necessary"

[8] *Accord* 51 EPD at 59,491 n.1 (Cudahy, J., dissenting) ("On this issue, I disagree with Judge Easterbrook's conclusion that the BFOQ standard could *never* be satisfied in a case such as this. . . . So long as it is understood that the burden to prove [that all or substantially women cannot perform the job without inordinate risk to third parties, including fetuses] rests on the employer, and that this burden may not be met by unsubstantiated hypotheses or claims of scientific uncertainty, (citation omitted), I am comfortable with allowing the employer at least the opportunity to attempt to meet this demanding standard.")

[9] In *Western Air Lines v. Criswell*, 472 U.S. 400, 37 EPD ¶ 35,291 (1985), involving a challenge to an airline's policy of requiring mandatory retirement for flight engineers at age 60, the Supreme Court described the BFOQ defense in the public safety context. First, the employer must prove that:

> the job qualifications [he] invokes to justify his discrimination [are] reasonably necessary to the essence of his business. . . . The greater the likelihood of harm and the probable severity of that harm . . ., the more stringent may be the job qualifications designed to insure safe[ty].

Id. at 413, citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, 11 EPD ¶ 10,916 (5th Cir. 1976).

to that business's "normal operation"—this must be proven.[10] To prove that such a practice is reasonably necessary the employer must demonstrate that it takes reasonable steps to identify and appropriately shield all persons from the hazard against which it purports to protect the excluded group. Most obviously, where an employer has excluded pregnant or potentially pregnant women on the basis of a perceived risk to the fetus, it must show that it similarly protects the offspring of its male employees from the same or analogous risks. In addition, it must show that it attempts to protect others from the same hazard. Containment of a particular hazard, such as lead, can hardly be reasonably necessary to its normal operations if the employer carelessly exposes everybody to that hazard except potential offspring of female employees.

If the employer establishes that protecting others from the particular hazard is part of its normal business operations, it must then establish that its exclusionary policy is reasonably necessary to further that interest. As the Supreme Court said in *Western Air Lines, Inc. v. Criswell*, 471 U.S. 400, 414, 37 EPD ¶ 35,291 (1985), the discriminatory qualifications must:

> be something more than 'convenient' or 'reasonable'; they must be reasonably necessary . . . to the par-

[10] In age public safety cases, for example, to justify its exclusion of older workers on safety grounds, the employer must demonstrate that to protect the public from real risks, it applies the same standards across the board. Where, for example, a police department defends its exclusion of older officers on the basis of lower aerobic capacity or alleged higher risk of cardiac disease, the Commission has consistently argued that, to make out a BFOQ defense, the department must impose similar fitness requirements on all of its officers. It cannot establish that protecting the public against the risks occasioned by an officer suffering a cardiac incident is reasonably necessary to the normal operations of its particular business if it retains younger officers who, by virtue of factors such as smoking or obesity, pose a similar risk.

> ticular business,' and this is only so when the employer is compelled to rely on [the discriminatory classification] as a proxy for the safety related job qualifications validated in the first inquiry.

In a BFOQ defense of a fetal protection policy excluding women workers, the employer must prove that there is a substantial risk of harm to offspring through occupational exposure of potential parents to the hazard identified. Next, if it applies its protective policy only to women, it must prove that the risk is transmitted only through pregnant women and that it has a factual basis for believing that all or substantially all of the excluded group cannot perform the job without jeopardizing the safety of the group's offspring. (*See Johnson Controls*, 51 EPD at 59,492 n.1 (Cudahy, J., dissenting), citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)). In other words, the employer must prove that the policy it has adopted to reduce risk is narrowly tailored: if it excludes all fertile women when the risk is only through pregnant women and there are reasonable steps which can be taken to reduce or eliminate, as necessary, the exposure of pregnant women, the exclusionary policy cannot be said to be "reasonably necessary".[11] Similarly, if there are reasonable ways to test for safe levels of the hazard, as is true in the case of radiation and lead exposure, the employer that does not use such tests to minimize the extent of the exclusion will not meet its BFOQ obligations.

In short, whether one applies the BFOQ or the "business necessity" analysis as discussed in the fetal hazard policy guidance, the burden is on the employer to justify

[11] The majority does not appear to have required Johnson Controls to make this showing. It acknowledged the propriety of the *Weeks* standard but perfunctorily concluded that the policy was a BFOQ without discussing whether Johnson Controls has proved that it had defined the excluded group as narrowly as possible despite the fact that the policy excluded all women age 70 and under.

its policy. The pertinent questions are: 1) whether there exists a substantial risk of harm to offspring through workplace exposure to a hazard; 2) whether that risk takes place only through the exposure of one sex; 3) whether the policy minimizes the risk while excluding the narrowest possible group; and 4) whether there are reasonable alternatives which are less onerous to women. *See* Fetal Hazard Policy Guidance, nn. 14-17 and accompanying text.

b. Propriety of Summary Judgment

The Seventh Circuit found no genuine issue of material fact to warrant denial of summary judgment to Johnson Controls. In the Commission's view, as stated in the interim Fetal Hazard Policy Guidance at n.22, this case did present conflicting evidence. As Judge Cudahy stated in his dissent, this case presented "painful complexities [which] are manifestly unsuited for summary judgment." 51 EPD at 59,492.

Commission investigators should not overlook or dismiss conflicting evidence on the basis of the Seventh Circuit decision. Although the majority was satisfied that substantial risk to the fetus was established, Judge Easterbrook stated that there was a dispute as to the extent to which the level of lead to which Johnson exposes its employees would endanger a fetus. *Id.* at 59,503. He also observed that the risk of harm to a fetus should also include the risk of inferior prenatal care resulting from removing women or denying them access to well-paying jobs with attendant health insurance. *Id.* at 59,505.

There was substantial conflicting evidence as to whether the risk of lead exposure to a fetus is mediated only through women. 51 EPD at 59,492 (Cudahy, J., dissenting). *See* EEOC's Policy Guidance on Reproductive and Fetal Hazards at 9 n.22 (district court's issuance of summary judgment in *Johnson Controls* was not appropriate because there was conflicting evidence about harm medi-

ated through men). Judge Easterbrook, in his dissent, stated that the American Public Health Association and other medical groups, filed an *amicus* brief "marshaling an impressive array of studies linking lead with injury to the male reproductive system, and thence to offspring." *Id.* at 59,506. While most of the data came from animal studies, some human studies, according to Judge Easterbrook, also suggest the same result.

The majority in *Johnson Controls* rejected UAW's animal research evidence, stating that it was "speculative," "unconvincing" and not "solid scientific data." *Id.* at 59,481. *See* n.3, above. Commission investigators should not reject animal studies in such a wholesale manner. *See* 51 EPD at 59,506 (Easterbrook, J., dissenting) ("The medical profession . . . will be stunned to discover that animal studies are too "speculative", slip op. 33, to be the basis of conclusions about risks"). These studies may in some cases provide the best available evidence to evaluate fetal or other human health hazards in the workplace. Certainly, the data from the animal research in this case, along with the other data provided, should have been sufficient to create a genuine issue of material fact warranting denial of summary judgment. Also significant to the issue of harm mediated through both sexes, is OSHA's finding that lead in men, as well as women, is hazardous to the unborn and its conclusion that exclusion of only women is not the proper solution. The majority failed even to acknowledge this aspect of OSHA's findings. *See id.* at 59,505, citing 43 Fed. Reg. 52953, 52966 (1978) and 29 C.F.R. Part 1910, pp. 833-34 (1987). Commission investigators, in contrast, should defer to pertinent conclusions by appropriate government agencies. *See* n. 16 and accompanying text.

There was also conflicting evidence as to the feasibility of more narrowly drawn alternative measures. *See* Judge Posner's dissent at 51 EPD at 59,496, noting that, even assuming harm, there were questions about the "feasibility of warnings as a substitute for a blanket exclusion of women",[12] and "what other battery manufacturers do about the hazards of airborne lead to the fetus." Judge Eatserbrook observed that women could be allowed to work in areas in which many employees are able to keep their blood levels within the safe range to see if they can do the same. 51 EPD at 59,507.

III. Charge Processing

Commission field offices should not rely on the *Johnson Controls* decision as guidance for processing "fetal hazards" charges.[13] Employment policies that exclude women on the basis of pregnancy or capacity to become pregnant are discriminatory on their face and employer justifications for such policies must be examined critically. The majority in *Johnson Controls* gave undue deference to the employer's judgment in broadly drawing its exclusionary policy. The court stated that this deference was required due to the "unique" nature of Johnson's business and the "difficult societal problem" that the policy was designed to address." 51 EPD at 59,487. As further support, the court twice quoted the Supreme Court's statement in *Wards Cove*, that "[c]ourts are generally less competent than employers to restructure business practices . . . [and] consequently, the judiciary should proceed with care before mandating that an employer must

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[12] Before adopting its blanket exclusion of women "of childbearing capacity," Johnson Controls issued a mild warning comparing the fetal hazards of airborne lead to those of cigarette smoking. 51 EPD at 59,496. During that period, eight women in the battery division became pregnant, but the record did not reveal the total number of women employed. Thus, it is possible that even the mild warning was effective for the vast majority of female employees, and that a stronger warning would have deterred other fertile women from working in the division.

[13] Of course, it is currently binding precedent in the Seventh Circuit and offices in that Circuit must evaluate charges in light of it.

adopt [an alternative employment practice] in response to a Title VII suit." *Id.* at 59,487 and 59,491, quoting *Wards Cove*, 109 S.Ct. at 2127. However, the Supreme Court's statement was made in the context of an adverse impact challenge to neutral job selection practices. Such deference is not required when the practice that is challenged is facially discriminatory.

The directions for investigation and evaluation of evidence set forth by the Commission in its interim Policy Guidance on Reproductive and Fetal Hazards, as elaborated on by this document, should continue to be followed in processing charges challenging fetal protection policies.[14] *See also* Section 624 of the Compliance Manual. While the Commission now believes, for the reasons explained above at 6, that a BFOQ rather than business necessity is the appropriate defense, the elements of inquiry set forth in the policy guidance remain applicable to Commission investigation of fetal hazard policies. As stated above, fetal protetcion policies that exclude only one sex from particular jobs are facially discriminatory and cannot easily be justified. The first inquiry is whether protection from the hazard at issue is part of

[14] Two aspects of the interim Policy Guidance need to be clarified. First, it stated that where there was reliable evidence of risk to women, but inconclusive evidence of risk to me, the Commission would proceed as if the risk were confined to women. In so saying, the Commission was referring to situations in which the evidence of risk to men was speculative and meager. It intended that where there is reliable—albeit inconclusive—evidence of harm mediated through men the Commission will conclude that excluding only women is not justified and will issue a cause LOD. Second, the chart at the end of the policy guidance is confusing, in part because it was developed under the rubric of business necessity, and should no longer be relied upon.

Finally, while the Policy Guidance reflects the fact that most fetal hazard policies exclude women, it is possible that an employer might exclude only men. The interim Policy Guidance, as clarified here, would apply equally to such cases, with the genders simply being reversed.

the normal operation of the business. Second, there must be objective evidence of substantial risk to offspring through workplace exposure of the excluded group. Mere suspicion or fear of risk is not sufficient. The scientific evidence must also show that the harm is mediated only through the excluded group. Finally, the policy will not withstand scrutiny if a less discriminatory alternative policy is reasonably available that would effectively protect employees' offspring.

In evaluating these cases, the field must weigh the extent of the risk against the breadth of the exclusion. Thus, where the risk is slight, in terms of numbers and nature of the harm, any exclusion will be hard to justify; conversely, severe harm to a high percentage of those exposed may warrant a broader exclusion.[15] *See* 51 EPD at 59,504 (Easterbrook, J., dissenting) ("a small risk, even if compellingly documented, is not enough to exclude women from employment"). For further guidance on evidence to be obtained, *see* Policy Guidance on Fetal Hazards at 6-7.

In determining whether the harm is mediated only through one sex, animal research should be considered along with any other objective scientific evidence. The Commission will defer to pertinent findings by government agencies such as OSHA or NIOSH.[16] *See* Policy Guidance on Fetal and Reproductive Hazards at 8.

[15] As the Supreme Court noted in *Criswell*, the first prong of the BFOQ test "adjusts to the safety factor." 472 U.S. at 413. *See supra* n.6.

[16] Of course, the Commission would consider evidence of scientific developments subsequent to the issuance of government regulations which might, for example, show substantial risk at a lower level of exposure than was thought harmful when the regulations were written. However, where an agency such as OSHA has found evidence of harm mediated through men and has explicitly rejected the approach of excluding only women, the Commission will generally defer to that decision in determining whether an exclusionary policy is justified.

Even if the risk of harm were mediated only through one sex, the Commission thinks that an exclusion as broad as the one in *Johnson Controls* could seldom be justified. Again, these are discriminatory policies and must be drawn as narrowly as possible consistent with achieving legitimate safety goals. Johnson Controls excluded all presumptively fertile women even from non-hazardous jobs from which they might be promoted into high-lead jobs.[17] 51 EPD at 59,497. This aspect of the "fetal protection" policy is not necessary to protect the offspring; rather it is a matter of convenience. As such it could not constitute a defense (*See Criswell* quoted *supra* at 8) and the Commission would find cause as to the portion of the policy even if it concluded that some exclusion may be warranted. Finally, where safe blood levels can be ascertained there can be little reason to exclude women whose blood levels are within the safe range.

While it is the Commission's position that the employer carries the burden of proof in litigation of justifying the challenged policy, the investigator should seek out all reasonably available evidence relating to the workplace hazard, the risk of fetal or reproductive harm, the steps the employer takes to protect others from the hazard, the harm mediated through the non-excluded sex and any less discriminatory alternative policies.

Date: 1/24/90

Approved: /s/ R. Gaull Silberman
R. GAULL SILBERMAN
Vice Chairman

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[17] The employer's policy also was excessively cautious in presuming that any woman under the age of 70 is fertile. 51 EPD at 59,497. However, Judge Posner noted that this aspect of the policy was harmless since a woman too old to bear children need only submit a letter to that effect from her doctor to be permitted to work in the battery plant.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Title VII of the 1964 Civil Rights Act, § 701(k), 42 U.S.C. § 2000e(k), provides:

> (k) The terms "because of sex" on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

Title VII of the 1964 Civil Rights Act, § 701(a), 42 U.S.C. § 2000e-2(a), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the 1964 Civil Rights Act, § 703(e), 42 U.S.C. § 2000e-2(e)(1), provides in part:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . .

Supreme Court, U.S.
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No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; JCI SDN BHD; Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corporation; Pannabco; Pannesma; Pan Am Information Systems; Faini F.A.I.N. SrL; Seating Systems Technology, Inc.

LIST OF PARTIES

Contrary to this Court's Rule 14.1(b), the petition does not contain a list of all parties to the proceeding in the Court of Appeals for the Seventh Circuit. In addition to the International Union listed on the petition's caption, those parties were UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516, and 1719, and Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, all plaintiffs-appellants; Local 322, Allied Industrial Workers of America, AFL-CIO, an intervening plaintiff-appellant; and Johnson Controls, Inc., the sole defendant-appellee.

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OTHER AUTHORITIES:	
110 Cong. Rec. 2718, 7213 (1964)	16
Centers for Disease Controls, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* (1985)	4-6
EEOC, *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988)	13, 17
EEOC, *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.* (Jan. 24, 1990)	13-14, 17

No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.,*

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Johnson Controls, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *International Union, UAW v. Johnson Controls, Inc.,* 886 F.2d 871 (CA7 No. 88-1308, Sept. 26, 1989).

COUNTERSTATEMENT OF THE CASE

The UAW's petition repeatedly either misstates or overlooks the record evidence, how the District Court and the Court of Appeals analyzed that evidence, and the UAW's own concessions and waivers of material issues that it now belatedly seeks to raise.

A. The Substantial Risks Of Irreversible Injuries To Unborn Children Through Maternal Exposure To Lead.

The UAW conceded to the Court of Appeals that it was "clear" that the record evidence established a "substantial risk of harm to the fetus" from lead exposure. Brief of Plaintiffs-Appellants 33. *See also id.*, at 37 (substantial risk to fetus "is not one of the disputed issues"). In its petition to this Court, however, the UAW now suggests that the harms to unborn children from the "relatively low" blood lead levels involved here are in fact "very subtle" and that, for all the record discloses, "the likelihood of *any* harm to a child of an exposed women [*sic*] employee" may be no more than "one in a million." Pet. 7 n. 3, 8 (emphasis in original).

This effort to render obscure what was "clear" below is unconvincing.

1. As both the District Court and the Court of Appeals concluded after exhaustive reviews of the record,[1] there is overwhelming evidence that, at the levels involved here, lead in a pregnant woman's blood poisons the fetus's developing brain and central nervous system. Lead "transfers" from the woman's blood across the placenta to the fetal circulatory system; "[b]ecause the fetus's blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother." Pet. App. 12a & n. 13 (citing evidence). Once in the fetus's blood, lead causes "substantial irreversible cellular and functional damage to the brain," Silbergeld Dep. 49-50; this is so because a fetus (like a small child but unlike an adult) has not yet developed a barrier that would prevent lead from entering its brain directly from its blood, Fishburn Dep. 14-23.[2] *See generally* evidence cited at Pet. App. 12a-17a, 104a-107a.

The results of such damage are devastating and have variously been characterized as including *irreversible* "retarded cognitive

[1]*See generally* Pet. App. 12a-20a, 32a-36a, 48a-49a, 53a, 104a-108a, 114a-115a.

[2]Dr. Charles W. Fishburn is Assistant Clinical Professor in the Department of Preventive Medicine at the University of Wisconsin-Madison.

development," Chisolm Aff. ¶ 6;[3] *permanent* "intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities," Scialli Aff. ¶ 7;[4] "decreased neuro-behavioral development," Whorton Aff. ¶ 8;[5] and a "clear decrement in the subsequent mental development of the infant," Hammond Aff. ¶ 3.[6] Far from "one in a million," Pet. 8, the risk of such injuries from the maternal blood lead levels involved here was established below to be "large," "substantial," and "grave."[7]

The effects of such injuries are "very subtle," Pet. 7 n. 3, only in the sense that they "may not fully manifest themselves until the child is diagnosed as having learning problems in a school setting some five to six years after birth," Pet. App. 16a. At that point the child

> " 'discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child perhaps toward the end of the first grade, particularly in the second grade.' " Pet. App. 16a, *quoting* Chisolm Dep. 27.

2. These injuries cannot be avoided by waiting to remove a female employee from exposure to the lead levels involved in this case until she decides to become pregnant. First, it would be irresponsible to ignore the fact that, in the Court of Appeals' words, frequent "unplanned or undetected pregnancies" are "one

[3]Dr. J. Julian Chisolm is Director of the Lead Program at John F. Kennedy Institute in Baltimore and Associate Professor of Pediatrics, Johns Hopkins School of Medicine.

[4]Dr. Anthony R. Scialli is Director of the Reproductive Toxicology Center in Washington, D.C.

[5]Dr. M. Donald Whorton is Senior Occupational Physician/Epidemiologist at Environmental Health Associates, Inc. in Oakland, California, and Associate Clinical Professor of Occupational Medicine at the University of California School of Public Health in Berkeley.

[6]Dr. Paul B. Hammond is Professor of Environmental Health at the University of Cincinnati.

[7]*See, e.g.*, Fishburn Dep. 61, 74; Scialli Aff. ¶ 10; Chisolm Aff. ¶ 6; Whorton Aff. Ex. C; Hammond Aff. ¶ 3. *See also* Pet. App. 12a, 20a, 32a, 114a-115a, 119a.

of the exigencies of life"; "[u]nder a policy requiring removal only on discovery of pregnancy, the unborn child would be subject to lead exposure throughout the period prior to diagnosis of pregnancy." Pet. App. 9a n. 11, 10a; *see also* Chisolm Aff. ¶ 9; Scialli Aff. ¶ 11.[8] Second, lead is an "accumulative toxicant"—because it builds up in the blood and soft tissues and is stored in the bones, blood lead levels may take two or three times as long to decrease as they do to increase. And because the bones decalcify during pregnancy to nourish the developing fetus, "stored lead" can be "transferred" to the fetal brain long after the mother's removal from lead exposure. Pet. App. 17a-19a (quoting evidence).[9]

It was precisely because of this continuing threat to "the growing brain of the fetus" that the Centers for Disease Control announced several years ago that "[t]he prevention of lead exposure to the fetus needs special emphasis. *Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*"[10]

3. It is the fetus's *direct* exposure to the maternal blood lead levels involved here that causes the injuries described above. The UAW unsuccessfully sought below to create a genuine factual dispute as to whether equivalent fetal injuries can be *genetically* caused by malformed sperm ("teratospermia") from male workers *with blood lead levels equivalent to those at issue here*. As the Court of Appeals concluded, the evidence of such an equivalent risk "is, at best, speculative and unconvincing." Pet. App. 34a.

[8]The fetus may suffer severe harm from lead exposure during this time. Moreover, it is believed that lead is stored in the placenta " 'during the early stages of pregnancy to be released [later] when the placenta becomes functional.' " Pet. App. 19a n. 24 (citations omitted); *see also* Fishburn Dep. 22, 26-27.

[9]*See especially* Whorton Aff. Ex. C, p. 8 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant blood lead burden would pose a potential hazard to any conceptus for many years after exposures"); Chisolm Aff. ¶ 10 ("if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered").

[10]Centers for Disease Control, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* 21 (1985) (emphasis added). *See* n. 16 *infra*.

The UAW's petition to this Court continues to mischaracterize what the available evidence shows. That evidence—including the 12-year-old OSHA rulemaking record relied upon so heavily throughout the petition—at most suggests that men with roughly equivalent blood lead levels may risk temporary reductions in fertility—*i.e.*, decreased number of sperm ("hypospermia") or sperm with decreased mobility ("asthenospermia")—but that risks of birth defects or other fetal injuries caused by deformed sperm occur only at much *higher* paternal blood lead levels than those involved here.[11] Those *higher* levels are avoided through compliance with OSHA's maximum lead-exposure limits applicable to all employees. *See* 29 CFR § 1910.1025 (1989). OSHA's standards, however, do *not* prevent the fetal injuries described above, which result from the fetus's dependence upon the maternal environment and are inflicted at much *lower* blood lead levels. *See generally* Pet. App. 34a-35a, 115a-116a, 119a; Chisolm Aff. ¶ 8; Scialli Aff. ¶ 10; CDC, *Preventing Lead Poisoning in Young Children*, n. 10 *supra*, pp. 7, 20-21.

The UAW also sought to rely on rodent studies in positing that male-transmitted fetal injuries might occur at lead levels comparable to those at issue here. As discussed in further detail below,

[11]OSHA, for example, has noted that while hypospermia and asthenospermia have been detected at 41 micrograms per 100 grams of whole blood—11 micrograms above Johnson Controls' maximum allowable limit for fertile women—teratospermia (malformed sperm) have been detected only at the much higher level of 53 micrograms, nearly twice the maternal blood lead levels known to pose substantial dangers of direct and irreversible harm to fetuses. *See* App. C to 29 CFR § 1910.1025, p. 185. The discussion of the OSHA rulemaking record in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1256-1257 (CADC 1980), *cert. denied*, 453 U.S. 913 (1981), similarly fails to identify any evidence of fetal injuries caused by male blood lead levels *equivalent to those involved here*.

Using the rubric of "reproductive" risk, the UAW's petition cites only to a *fertility* study in support of the *very different* proposition that, at a male blood lead level of 30 micrograms, there is a "significant risk" to the "health of potential children." Pet. 8 & n. 5.

however, the evidence established that those studies could not be extrapolated to humans given the material differences between human and rodent reproductive systems. Even UAW experts ultimately conceded that the evidence of "male-mediated" risk at the lead levels involved in this case is, at best, speculative; "[w]e don't know" whether such risks at these levels really exist. Brix Dep. 19-20; *see also* pp. 23-24 *infra*. That is a far cry from the "overwhelming evidence" and "general consensus within the scientific community" as to the irreversible destruction caused by fetal exposure to the maternal blood levels here at issue. Pet. App. 20a.[12]

B. Johnson Controls' Responses To These Risks.

Johnson Controls, a manufacturer of automotive and specialty batteries, has long been a recognized industry leader in its comprehensive efforts to protect employees and their families from the adverse effects of lead.[13] The company's programs, which long predated OSHA regulation in this field, exceed OSHA's current requirements (*see* 29 CFR § 1910.1025 (1989)) and have significantly reduced the blood lead levels of its employees.[14] As the courts below found, however, neither Johnson Controls nor any-

[12]The UAW also cites to evidence of other potential adult health risks at the 30 microgram level, such as increased risks of high blood pressure. Pet. 9 & n. 6. This ignores the fact that adult effects can be monitored and controlled apart from measuring blood lead levels and that, when ill effects in employees are detected, corrective action, including removal if necessary, can and is taken *regardless* of blood lead levels. These monitoring and corrective measures cannot be taken with respect to fetuses. *See, e.g.*, Fishburn Dep. 11-14, 20-25, 30, 81-82; Beaudoin Aff. Ex. B, pp. 125-127, 131-132, Exs. D, F-G. Moreover, it is generally accepted that "the fetus is more vulnerable to levels of lead that would not affect adults." Pet. App. 115a; *see also* Chisolm Aff. ¶¶ 6-8; Scialli Aff. ¶¶ 5, 10; Whorton Aff. ¶ 9 and Ex. C; Fishburn Dep. 14-23; Legator Dep. 47-50; CDC, *Preventing Lead Poisoning in Young Children*, n. 10 *supra*, pp. 20-21.

[13]As summarized by the Court of Appeals, these efforts include elaborate environmental engineering controls; extensive biological monitoring, medical surveillance, and employee counseling and education programs; and programs for respirator use, employer-provided clothing and shoes, personal hygiene, improved work practices, and paid wash-up and shower time. Pet. App. 3a-4a; *see also* Beaudoin Aff. ¶ 6, Ex. B, pp. 118-133, 171-172, Exs. C-I.

[14]Beaudoin Aff. ¶¶ 18-19, Exs. B, L-M.

one else has to date been able "to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women." Pet. App. 9a; *see also id.*, at 116a ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels").

From 1977 to 1982, Johnson Controls attempted a variety of fetal protection measures focusing on employee education and counseling and voluntary avoidance of high-risk positions by women planning to have children. Notwithstanding its voluntary program, fertile women continued to work in high-lead areas and at least six employees became pregnant with lead levels in excess of 30 micrograms per deciliter of whole blood; at least one infant showed early signs of fetal lead injuries. Pet. App. 6a-8a.

Based on the failure of these earlier attempts, and in light of the growing evidence of the substantial health risks involved, Johnson Controls in 1982 adopted the Fetal Protection Policy at issue in this case. As described in further detail by the Court of Appeals, the policy generally prohibited women capable of bearing children from working in jobs where there was a likelihood that their blood lead levels would rise above 30 micrograms per deciliter—the Centers for Disease Control's standard then in effect. Pet. App. 5a-6a & n.7, 54a.[15] Employees covered by the policy who already were in such high-risk positions were permitted to remain in those positions if they were able to maintain their blood lead levels below 30 micrograms; those who could not were transferred to other positions and paid medical removal protection benefits to ensure they suffered no loss in wages. Fertile women who were not presently in high-risk positions were precluded from transferring into them. Since 1982, Johnson Controls has continued to review, update, and refine its policy in light of

[15]Although the UAW now argues that Johnson Controls might have used other methods in determining likelihood of high blood lead levels in particular positions, *see* Pet. 2, 5-6 & n. 2, 12, 24 n. 16, it waived the issue of alternative approaches below, *see* pp. 9-10, 19-21, *infra*.

the best available medical evidence so as to reduce fetal health risks while minimizing the effect upon fertile women.[16]

C. The Proceedings Below.

In the District Court, the parties stipulated to the certification of the case as a class action consisting of certain past, present, and future employees affected by the Fetal Protection Policy. After the parties had been given a full opportunity for discovery, Johnson Controls moved for summary judgment. The District Court followed the lead of the Fourth and Eleventh Circuits in placing on Johnson Controls the burden of demonstrating (a) substantial risks of fetal harm at the lead levels at issue and (b) that transmission of that risk occurs through female but not male employees. Pet. App. 113a-118a. The District Court found the record evidence created no genuine dispute with respect to either issue: the risks are substantial; "retarded cognitive development" and other harms "are abnormalities too serious for this Court to find unimportant"; and at the 30 microgram level these dangers are confined to transmission through women. "Men simply cannot expose a fetus to lead in the same way women can." *Id.*, at 117a, 119a-120a.[17]

[16]In 1985, the Centers for Disease Controls lowered from 30 to 25 micrograms its recommended maximum "umbilical cord blood level[ ]" for lead. *See* n. 10 *supra.* Ironically, the UAW's petition simultaneously criticizes Johnson Controls' 30 microgram standard as being more relaxed than the CDC's recommended standard while elsewhere criticizing Johnson Controls for not following the even more relaxed OSHA standards, which only require the removal of employees with blood lead levels of 50 micrograms or more. Pet. 7 n. 3; *see also* 29 CFR § 1910.1025(c),(k) (1989). Although not reflected in the record, after this case had been submitted to the Court of Appeals Johnson Controls revised its policy and adopted the CDC's present recommended 25 microgram level.

The UAW also criticizes a provision in the *original* 1982 policy that excluded fertile women from jobs in "lines of progression" which contained high-risk positions. This argument was waived below. *See* pp. 9-10, 19-21 *infra.* Moreover, this provision applied only to *applicants* and thus did not affect the certified class (*employees*) represented by the UAW in this case. In addition, the "lines of progression" provision was *eliminated* when Johnson Controls revised its policy and thus is no longer in effect.

[17]The District Court also found that the UAW had failed to establish "an acceptable alternative that would have a lesser impact on females." Pet. App. 119a. The UAW waived this issue on appeal. *See* pp. 9-10, 19-21 *infra.*

The Court of Appeals affirmed the District Court's judgment in a 7-4 *en banc* decision.[18] The UAW's Statement of the Case seriously mischaracterizes the majority's decision in several important respects.

First. The UAW asserts "[t]he Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs . . . was essential to its ultimate affirmance of summary judgment for the defendant company." Pet. 11. That is untrue. The court instead concluded that the allocation of proof burdens was *irrelevant* given the record evidence in this particular case: if a business necessity analysis was used and the burden of persuasion placed on the UAW (pursuant to *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989)), Johnson Controls was entitled to summary judgment; if instead a bona fide occupational qualification (BFOQ) analysis was used and the burden of persuasion on all issues placed on Johnson Controls, Johnson Controls *still* was entitled to summary judgment. Pet. App. 42a, 48a-54a, 58a-59a. Rather than "essential," the burden-of-persuasion issue in this case was immaterial.[19]

Second. Both in its Statement of the Case and elsewhere throughout its petition, the UAW repeatedly criticizes the Court

[18]Two of the dissenting judges, while disagreeing with the majority that summary judgment had been appropriate on the specific record here, nevertheless agreed that Title VII does *not* categorically prohibit an employer from adopting fetal protection policies of the sort involved in this case. *See* Pet. App. 60a n. 1 (Cudahy, J., dissenting) (under Title VII, "[t]he employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking"); Pet. App. 69a (Posner, J., dissenting) ("I can find nothing in the text of the statute, or in its history or purpose, to prevent an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead on the ground that such refusal is reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of his particular business").

[19]Similarly inaccurate is the UAW's assertion that "[t]he majority opinion does not mention the PDA [Pregnancy Discrimination Act]." Pet. 13 n. 7. It does. *See* Pet. App. 43a-44a (analyzing BFOQ defense "[i]n the context of the Pregnancy Discrimination Act," and emphasizing the need "to avoid either using traditional stereotypes or falling into the equally unsatisfactory alternative of ignoring the real differences between men and women").

of Appeals' alleged failure to consider a number of suggested alternatives to Johnson Controls' Fetal Protection Policy which the UAW now advances and which, it asserts, might provide satisfactory protection against the risk of fetal harm with less impact on fertile women (*e.g.*, narrowing the class of fertile women excluded from high-risk positions, experimenting with greater individual testing or employee education, etc.). Pet. 2, 5-6 & n. 2, 11-12, 23 n. 15, 24 n. 16. The UAW omits to mention that it *waived* this issue below. It explicitly advised the Court of Appeals that, while the question of "alternative policies" would "ordinarily be at issue in a case of this type," it had elected *not* to pursue that issue; instead, it had decided that the "only [issues] that will determine the outcome of *this* case" were the questions of the risks of lead to the offspring of female workers as compared "to the offspring of male workers" and "to the adult workers" themselves. Brief of Plaintiffs-Appellants 36 n. 14, 37-38 (emphasis added). The Court of Appeals accordingly held that the UAW had waived the issue of adequate but less discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4). Pet. App. 36a-38a. The UAW has not petitioned for review of the Court of Appeals' waiver decision, but instead has simply ignored it.

Third. Although the UAW suggests the Court of Appeals' decision by its terms will have sweeping effects, the court itself emphasized the narrowness and limited precedential significance of its decision given, *inter alia,* the following:

> a. Unlike many other industries in which toxic substances can be eliminated or reduced to safe levels, there is presently no engineering technology in this industry that can reduce employee lead exposure "to acceptable levels for fertile women"; "if ever a lead-free battery were developed, the problems in this case would fall by the wayside." Pet. App. 9a, 59a n. 43.
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> b. Before the court's decision could be applied to any other industry or substance, there would "obviously" have to be the "same rigid testing and research" that had "conclusively established the grave risk from lead substances." Pet. App. 59a n. 43.

> c. The court's factual analysis of the relative risks of transmitting lead to an unborn child through the mother as opposed to the father was limited to the "scientific data available as of this date." Pet. App. 36a.[20]
>
> d. The critical question of "adequate but less discriminatory alternatives" was not before the court as a result of the UAW's waiver of that issue. Pet. App. 36a-38a.

REASONS FOR DENYING THE WRIT

The UAW's petition for certiorari should be denied for at least five reasons:

First. The United States courts of appeals that have thus far considered the issue have *unanimously* and correctly held that Title VII permits an employer to adopt a fetal protection policy where (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards, (b) the transmission of that harm to offspring is confined to employees of one sex, and (c) there are no adequate but less discriminatory alternatives to the employer's policy. This unanimous precedent does not conflict, but is entirely consistent, with applicable decisions of this Court.

Second. Although the courts have in other respects taken different analytical approaches and allocated proof burdens in different ways, these issues—which are at the heart of the UAW's petition—are of only theoretical significance in *this* case because the Court of Appeals found that Johnson Controls was entitled to judgment under *either* a BFOQ *or* a business necessity defense and *irrespective* of where the relevant burdens of persuasion were placed. Thus the petition in effect seeks an advisory opinion on

[20]The UAW attempts to ascribe broader significance to this case by asserting that the Court of Appeals "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans." Pet. 15, 26 (emphasis in original). As shown below, pp. 22-24 *infra,* the Court of Appeals did no such thing, determining instead that the *particular* animal studies evidence the UAW had submitted to the District Court was "speculative and unconvincing" on the question whether lead-induced injuries can be transmitted to a fetus through the father at the blood lead levels involved here, and thus was insufficient to withstand summary judgment. Pet. App. 34a.

these issues. Their consideration by this Court should await a case in which their resolution would have a concrete effect upon the outcome.

Third. This would be a particularly inappropriate case for considering the permissible scope of fetal protection policies given that the UAW *expressly* waived the issue of "adequate but less discriminatory alternatives" below, and since that issue is thus not properly before this Court.

Fourth. With the exception of its "burden of persuasion" and "animal studies" arguments—both of which plainly mischaracterize the decision below—the UAW has not petitioned for review of whether the standards of Fed. R. Civ. P. 56 were properly applied to the record evidence in this case. That outcome-determinative question is thus not before this Court. In any event, the medical and scientific issues that the UAW did not waive below are intensely fact-bound, have been painstakingly considered by both the District Court and the Court of Appeals, and do not warrant this Court's plenary review.

Finally. Given the fact-specific nature of the inquiry and the UAW's waivers and concessions below, the Court of Appeals' decision is of limited precedential significance—as that court itself emphasized.

We address these considerations in turn.

I. Unanimous Federal Precedent Holds That Title VII Permits An Employer In Narrow Circumstances To Adopt A Fetal Protection Policy.

The UAW contends that a fetal protection policy of the sort involved in this case is *per se* illegal under Title VII. Such a program, it asserts, represents an impermissible "paternalistic concern" in matters that are none of an employer's business; the employer must defer to "a woman's own assessment of the risks of lead exposure." Pet. 22-23.

This view has *unanimously* been rejected by the courts of appeals that have addressed the issue. *See International Union,*

UAW v. Johnson Controls, Inc., 886 F.2d 871 (CA7 1989) (en banc); *Hayes v. Shelby Memorial Hospital,* 726 F.2d 1543 (CA11 1984); *Wright v. Olin Corp.,* 697 F.2d 1172 (CA4 1982). It also has been rejected by the Equal Employment Opportunities Commission (EEOC), the federal agency charged with enforcement of Title VII. *See* EEOC, *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) (hereinafter *1988 EEOC Policy Guidance*), *reprinted in* Fair Employment Practices Manual (BNA) 401:6013; EEOC, *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.* (Jan. 24, 1990) (hereinafter *1990 EEOC Policy Guidance*), *reprinted in* Pet. App. 127a-144a.

Specifically, while emphasizing that fetal protection policies are permissible only in extremely narrow circumstances and may not be based in any way upon notions of romantic paternalism or stereotyped characterizations of the sexes, the courts *unanimously* have recognized that Title VII allows sex-based distinctions where necessary to industrial safety—"the health of workers and their families, consumers, and environmental neighbors." *Wright,* 697 F.2d, at 1190 n. 26; *see also Hayes,* 726 F.2d, at 1552 n. 14. As the Court of Appeals emphasized below,

> "industrial safety (preventing hazards to health) is legitimately part of the 'essence' of the 'business' of a battery manufacturer, as it is of any manufacturing enterprise . . . . Certainly a policy is directly related to industrial safety when it protects unborn children from a substantial risk of devastating and permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical." Pet. App. 48a-49a.[21]

Not only are the courts in full agreement on this point, they all have considered the same underlying factors in assessing the va-

[21]Even two of the dissenting judges below, while disagreeing with the majority on other grounds, agreed that properly tailored fetal protection policies are permissible under Title VII. "[N]othing in the text of [Title VII], or in its history or purpose," suggests that "the normal (civilized, humane, prudent, ethical) operation of [a] particular business" may not include concern for the safety and health of the unborn children of its employees. Pet. App. 69a (Posner, J.); *see also* Pet. App. 60a (Cudahy, J.).

lidity of particular fetal protection policies. While taking different positions on whether these factors should be described as a business necessity or BFOQ analysis, *all* courts have concluded that a challenged policy is proper where

> (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards;
>
> (b) the transmission of that harm to offspring is confined to employees of one sex; and
>
> (c) there are no adequate but less discriminatory alternatives to the employer's policy.

See Pet. App. 20a-28a; *Wright,* 697 F.2d, at 1190-1192; *Hayes,* 726 F.2d, at 1548, 1552-1553; *see also EEOC 1990 Policy Guidance,* Pet. App. 138a-139a ("pertinent questions" are the same "whether one applies the BFOQ or 'business necessity' analysis").[22] The courts also have agreed that an employer cannot simply rely on subjective good faith beliefs; it must produce independent medical and scientific evidence "supported by the opinion evidence of qualified experts in the relevant scientific fields." *Wright*, 697 F.2d, at 1190; *see also* Pet. App. 53a; *Hayes*, 726 F.2d, at 1548.[23]

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[22]Implicit in the third factor is the requirement that the policy actually and effectively reduce the health risks to unborn children. "In other words, to avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available, with the least discriminatory impact possible." *Hayes,* 726 F.2d, at 1553.

[23]The courts also are in agreement that proof to a certainty on these matters is not required, but instead proof that " 'within the qualified scientific community . . . there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.' " Pet. App. 32a (*quoting Wright*, 697 F.2d, at 1191); *see also Hayes,* 726 F.2d, at 1548-1549. This uniform view accords with this Court's approach to safety issues in employment discrimination cases. *See, e.g., Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 419-420 (1985) (*re* BFOQ defense under ADEA) ("The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case. The employer cannot be expected to establish the risk of [injury] 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound' ") (citation omitted).

This consensus among the lower courts is consistent with this Court's applicable decisions, which have emphasized that Title VII permits employment classifications grounded on *"actual physical"* differences between the sexes, as opposed to "archaic or stereotypical notions." *California Federal Savings & Loan Ass'n v. Guerra,* 479 U.S. 272, 290 (1987) (emphasis in original); *see also Dothard v. Rawlinson,* 433 U.S. 321, 334-337 (1977). *Cf. Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 481 (1981) (Blackmun, J., concurring) (equal protection standards do not require one "to pretend that demonstrable differences between men and women do not really exist"). Moreover, the Court has stressed that Title VII reflects a "*balance* of rights" and does not require an employer to abandon legitimate business concerns. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989) (emphasis added); *see also id.*, at 1786. One such concern, repeatedly approved by this Court, is the taking of reasonably necessary measures "to further the overriding interest in public safety." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985) (*re* BFOQ defense under ADEA); *see also New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n. 31 (1979) (business necessity defense); *Dothard*, 433 U.S., at 335-337 (BFOQ defense).

The UAW's argument that safety should be viewed as being part of the "essence" and "central mission" of only a narrow class of businesses, and of concern only with respect to some classes of potential victims, finds no warrant in Title VII analysis. Pet. 22-24. Industrial safety should be a matter of "overriding interest," *Western Air Lines, supra,* at 413, to all manufacturers; as the Court of Appeals noted below, "Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible" so as to minimize a "substantial risk of devastating and permanent" injuries to unborn children. Pet. App. 48a-49a.[24]

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[24]The UAW's argument is particularly disquieting in light of the limited legislative history of what Congress had in mind by a BFOQ. Among the examples of a BFOQ given were "the preference of a French restaurant for a French

(Footnote continued on following page)

The UAW's suggestion that this Court has held that Title VII allows " 'the individual woman to make [the] choice for herself . . . [whether] to weigh and accept [the] risks' " is similarly misplaced. Pet. 22 *(quoting Dothard*, 433 U.S., at 335). The Court in *Dothard* emphasized instead that while this is so "[i]n the usual case," it is not when the safety of others "is at stake." 433 U.S., at 335 (permissible to exclude women guards from "male, maximum-security, unclassified penitentiary" where their presence would pose "a real threat" to themselves, other security personnel, and inmates). Similarly, "[m]ore is at stake," *ibid.*, in a case like this where the objective evidence establishes that maternal exposure to lead at the levels involved here threatens "devastating and permanent" injuries to unborn children, even where that exposure has occurred well before conception, Pet. App. 49a.

On the underlying legality of narrowly drawn and medically validated fetal protection policies, there is thus no conflict among the lower courts or with this Court's applicable decisions.

II. Differences Among The Courts Respecting The Appropriate Analytical Framework And The Allocation Of Proof Burdens Were Immaterial To The Outcome Below.

Although the courts have unanimously held that Title VII permits employers to adopt fetal protection policies in narrow circumstances, the UAW is correct that they have pursued different analytical approaches in reaching this result. *Wright* viewed such policies solely under a disparate impact/business necessity analysis. 697 F.2d, at 1186-1192. *Hayes* viewed such policies as "presumptively" constituting disparate treatment, but held the presumption could be rebutted upon a demonstration of (1) "substantial risk" of fetal harm which is (2) confined to transmission

(Footnote continued from previous page)
cook," "the preference of a professional baseball team for male players," and the preference for hiring female nurses to care for female patients. *See* 110 Cong. Rec. 2718 (1964) (remarks of Rep. Goodell); *id.*, at 7213 (memorandum of Sens. Clark and Case). It is difficult to fathom why these concerns should be lawful under Title VII but a concern for protecting the health of unborn children should not.

through one sex; if the presumption were rebutted, disparate impact/business necessity analysis would then apply. 726 F.2d, at 1548-1553.[25] The EEOC substantially embraced the business necessity approach in 1988 while noting that a BFOQ analysis was also potentially applicable.[26]

The Court of Appeals below agreed that a fetal protection policy could appropriately be analyzed under the business necessity defense. Although *Wright* and *Hayes* had allocated the burden of persuasion to the employer on the issues of substantial fetal risk and whether transmission of that risk was confined to the mother, the court below noted that, pursuant to this Court's decision last Term in *Ward's Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), while Johnson Controls bore the burden of coming forward with scientific proof on these issues, the ultimate burden of persuasion under a business necessity analysis remained with the UAW. Pet. App. 28a-30a.

The Court of Appeals went on to hold in the alternative that Johnson Controls' policy was also entirely lawful pursuant to a BFOQ defense, which *Wright* and *Hayes* had declined to follow. The court clearly recognized that Johnson Controls bore the burden of persuasion under a BFOQ analysis on all issues, and held that Johnson had carried that burden. Pet. App. 42a, 48a-54a, 58a-59a.[27]

[25]Although the use of disparate impact analysis "might be subject to logical dispute," *Wright*, 697 F.2d, at 1186, it is appropriate where "the employer can show that although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees," *Hayes*, 726 F.2d, at 1548.

[26]*See EEOC 1988 Policy Guidance*, Fair Employment Practices Manual (BNA) 401:6013. The EEOC subsequently has disapproved the business necessity analysis in light of *Ward's Cove* and the decision below, concluding that "BFOQ is the better approach." *EEOC 1990 Policy Guidance*, Pet. App.134a.

[27]As the Court of Appeals explained, a BFOQ analysis of a fetal protection policy involves "similar" scrutiny of the same underlying factors considered under the *Wright/Hayes* business necessity analysis. Pet. App. 43a. For this reason, the UAW is wrong in contending that the Court of Appeals should not have resolved the BFOQ question because "the District Court had declined to

(Footnote continued on following page)

The UAW asserts these analytical differences are "of sufficient importance to be outcome determinative in this case"; it would have this Court believe that "[t]he Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs . . . was essential to its ultimate affirmance of summary judgment." Pet. 11, 14; *see also id.*, at 21 (court "stressed" that allocation of proof burden was "its reason for approving a grant of summary judgment").

The Court of Appeals obviously did no such thing; to the contrary, it took pains to emphasize that under either a BFOQ or a business necessity analysis, and regardless of which party bore the ultimate burden of persuasion, Johnson Controls was entitled to summary judgment given the overwhelming evidence it had marshalled and the UAW's concessions and waivers of key issues (as discussed in greater detail below). Unless this Court were to conclude that fetal protection policies are *never* permissible under Title VII—a proposition that every court and the EEOC have rejected—its consideration of the questions presented by the UAW would be an abstract exercise wholly immaterial to the outcome below.

The UAW is correct that these questions are of "theoretical" significance. Pet. 14. Given the Court of Appeals' alternative holdings, they are nothing more than that in *this* case. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297 (1956); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Court does not sit to decide " 'abstract propositions' " through advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (*per curiam*) (citation omitted); *see also Rice*

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reach the issue." Pet. 12. The District Court had considered all of the underlying issues relevant to the BFOQ defense and, since its decision predated *Ward's Cove*, had allocated *to Johnson Controls* the burden of persuasion on the issues of fetal harm and relative risks of transmission. Pet. App. 114a-118a. The other relevant issue—whether there were adequate but less discriminatory ways in which Johnson Controls' policy might have been crafted—was waived by the UAW on appeal. *See* Part III *infra.*

v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955). Moreover, this is the first fetal protection case since the decision in *Ward's Cove* last June. There surely will be more such cases, and if uncertainties should persist among the lower courts there will be time enough for this Court to address them. Resolution of whether a BFOQ or business necessity analysis applies, and of how to allocate the persuasion burdens, "can await a day when the issue[s are] posed less abstractly" and when their disposition would have a "meaningful" result on the outcome in the case at hand. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted).

III. This Case Does Not Properly Present The Question Of The Permissible Scope Of A Fetal Protection Policy Because The UAW Waived That Issue Below.

The question whether there are feasible alternatives to a challenged fetal protection policy obviously is of central importance under both a BFOQ ("reasonably necessary") and business necessity ("adequate but less discriminatory alternatives") analysis. *See Western Air Lines, Inc. v. Criswell*, 472 U.S., at 413-415 (BFOQ); *Wards Cove*, 109 S. Ct., at 2125-2127 (business necessity). In its petition to this Court, the UAW repeatedly suggests that there might be feasible alternatives to the policy at issue here—perhaps the class of affected employees could be narrowed, or the number of restricted positions be reduced, or the blood-lead and air-lead triggers be refined, or renewed attempts at employee education and individual testing be tried. Pet. 2, 5-6 & n. 2, 11-12, 24 n. 16, 29.

These matters are not properly before this Court, however, because the UAW waived the issue of alternative approaches before the Court of Appeals. Specifically, the UAW emphasized to that court that it was presenting "two factual issues" on appeal—the comparative risks of lead transmission to the fetus through the male and the female, and the relative risks of lead to fetuses and adults. Brief of Plaintiffs-Appellants 32-34, 37-38. These is-

sues were "the *only* ones that will determine the outcome of *this* case." *Id.*, at 37 (emphasis added). The UAW went on to advise the court that it had decided not to contest the District Court's summary judgment with respect to "[t]he other material fact that would ordinarily be at issue in a case of this type"— "the question of whether there were alternative policies which the defendant could have adopted, other than the Fetal Protection Policy, which would have had a less disproportionate affect [*sic*] on the women workers." *Id.*, at 36-37 n. 14.[28] Johnson Controls noted in its brief in opposition (p. 33) that "the UAW does not even contest this point"; the UAW's reply brief was silent on the issue.

The Court of Appeals accordingly (and properly) held that the UAW had waived the issue of adequate but less discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4), which requires an appellant's brief to contain "the contentions . . . with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." *See* Pet. App. 36a-38a. The UAW has not sought review of this waiver determination; indeed, it does not even mention it.

Because the UAW waived the issue of whether and to what extent there might be reasonable alternatives to Johnson Controls' policy, that issue should not now be considered by this Court. *See, e.g., EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (this Court's "normal practice" is "to refrain from addressing issues not raised in the Court of Appeals") (dismissing writ of certiorari as improvidently granted); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n. 7 (1982) ("[b]ecause petitioner did not present this argument to the Court of Appeals, we do not address it"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). This should particularly be so where, as here, the Court of Appeals found the issue was waived and the petitioner has not sought review of that determination. It is difficult to perceive how a challenge to an employer's fetal protection policy

[28]The UAW also explained to the Court of Appeals that "the plaintiffs did not respond" to Johnson Controls' evidence that less restrictive alternatives had been tried but found insufficient. Brief of Plaintiffs-Appellants 36-37 n. 14.

might be certworthy where the question of alternatives to that policy is not properly before the Court. In circumstances such as this, where a "central" issue on which the proper resolution of the case "may well turn cannot be reached or resolved" because of the petitioner's waiver below, it would be improvident to grant certiorari. *EEOC v. Federal Labor Relations Authority, supra,* at 24.

IV. The UAW Restricts Its Challenge To The Propriety Of Summary Judgment To Two Arguments, Both Of Which Are Plainly Wrong.

The focus of the UAW's argument to the Court of Appeals was that the District Court had erred in granting summary judgment pursuant to Fed. R. Civ. P. 56(c) because there were allegedly significant disputes over several medical issues. Brief of Plaintiffs-Appellants 36-39.[29] Among other contentions, the UAW made the curious argument that the normal tools of civil discovery had not given it "any adequate opportunity" to counter Johnson Controls' expert evidence since "it is not usually considered good tactics to expose your case prematurely at the deposition stage, by prereviewing [*sic*] the types of questions the other side's experts will be asked" if the case is permitted to go to trial. *Id.*, at 38. The Court of Appeals rejected the UAW's Rule 56 arguments, holding that, under either a BFOQ or a business necessity analysis, summary judgment had properly been granted on the record before the District Court. Pet. App. 59a.

Whether the Court of Appeals properly applied this Court's Rule 56 precedents to the particular record evidence in this case is hardly a certworthy question, *and the UAW's petition nowhere presents this as a question for review.*[30] Instead, the UAW confines its summary judgment challenge to two discrete issues, the reso-

[29]The UAW also argued that sex-specific fetal protection policies are *per se* illegal under Title VII. Brief of Plaintiffs-Appellants 39-44. As to this contention, *see* Part I *supra.*

[30]The petition does not even cite to Rule 56 or to any of this Court's decisions construing the standards for granting or reviewing summary judgments.

lution of which it contends was "essential to [the] ultimate affirmance of summary judgment." Pet. 11. Both arguments are spurious.

First. The UAW contends that the Court of Appeals' allocation of the burden of persuasion to the plaintiff under a business necessity analysis (pursuant to *Ward's Cove*) was "certainly" necessary to sustain summary judgment, as the Court of Appeals itself "expressly recognized" and "stressed." Pet. 11, 21. As already shown, the Court of Appeals did no such thing; it emphasized instead that summary judgment was equally proper if all proof burdens were allocated to Johnson Controls under a BFOQ analysis. Pet. App. 42a, 48a-54a, 58a-59a.

Second. The UAW would have this Court believe that the Court of Appeals "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans"—a "holding" that was "vital" to the affirmance of summary judgment. Pet. 15, 26 (emphasis in original); *see also id.*, at 11-12. The UAW goes so far as to present this as a separate question for review, warning that "[t]his sweeping holding" and "categorical disqualification of animal studies" not only conflicts with other precedents but will undermine "the nation's health and safety regulatory system." Pet. 26-27.

While the UAW assures that "[t]he implications . . . cannot be overstated," Pet. 27, it has managed to do *precisely* that by omitting several key words from its misquotation of the language in the Court of Appeals' opinion. According to the UAW, the court below

> "ruled that 'animal research does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead.' " Pet. 12.

What the court *actually* said—the words omitted from the petition are italicized—was this:

> "*The UAW's* animal research *evidence* does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion . . . ," etc. Pet. App. 34a.

Properly quoted, and placed in the context of the surrounding analysis, the Court of Appeals' discussion does not even remotely suggest a "categorical disqualification of animal studies," but instead an analysis of the *particular* animal studies tendered and a rejection of any extrapolation to humans from those *particular* studies as "speculative and unconvincing." Pet. App. 34a. *Of course* animal studies can constitute an important predictive tool in appropriate cases, but "[t]he validity of extrapolation to humans from data derived from tests on animals" depends upon the particular facts and requires the application of judgment and "expertise." *Environmental Defense Fund, Inc. v. EPA,* 510 F.2d 1292, 1299 (CADC 1975). Here there was substantial expert evidence that "[s]tudies of the effect on the offspring of lead exposed male rats cannot be readily extrapolated to the human male, particularly as to the dose necessary to cause reproductive effects."[31] The Court of Appeals accepted this expert evidence and emphasized the significant "differences between the effect of lead on the human and animal reproductive systems." Pet. App. 34a (citing to affidavits and deposition testimony).

UAW experts themselves agreed with this conclusion:

> "I think there is very strong evidence based on both animal and human information that above a blood lead of perhaps 60 to 70 that there can be an impact on the male reproductive tract.

[31]Hammond Aff. ¶ 7; *see also* Scialli Aff. ¶ 9 (rodent studies in this area "cannot be extrapolated to humans" because "[t]he reproductive system of the rodent, in terms of transmissible changes in offspring due to exposure to toxic substances, is simply not analogous to the human reproductive system, male or female"); Chisolm Dep. 49-50. Dr. Scialli offered as "[a] specific example . . . the drug Thalidomide which was used in the 1960's to treat pregnant women. This drug was given to mice and rats and did not cause any birth defects; however, the drug caused major limb defects in human offspring." Scialli Aff. ¶ 9.

"Based on animal studies alone, it would appear that there is an impact of lead on the male reproductive tract lower than that, as low as perhaps say 40 to 50 blood lead.

"And it has [been] shown to cause problems in certain species of animals *but I cannot say that that's really the case in humans because we do not have good data in male patients, male subjects at those kinds of levels.*

"So I'm hesitant to make a statement one way or the other. *We don't know.*" Brix Dep. 19-20 (emphasis added).

Another UAW expert conceded the same point:

"Q. Am I correct in understanding that the literature does know with better certainty the levels at which the small child, and by extrapolation, the fetus, is in danger?

"A. Right.

"Q. Well below the current OSHA standard?

"A. Exactly.

"Q. And, certainly, you would agree that the knowledge of those safe or unsafe levels, if I can use that terminology, are well-documented and known with respect to the fetus and the small child; whereas, *when we are dealing with the spermatogenesis type problem, we are still dealing, based on current literature, in an unknown in terms of the precise levels?*

"A. *I would agree with that statement. I would certainly agree with that statement.*" Legator Dep. 63 (emphasis added).

Thus the UAW is flatly wrong in asserting that the Court of Appeals rejected the validity of animal studies "as a matter of law." Pet. 26. Rather than challenge the court's application of the standards of Rule 56 to the particular animal studies data in the record—which is not a certworthy issue—the UAW has simply tried to mischaracterize what the court did.

Putting the burden-of-persuasion and animal studies questions to one side, the UAW has not petitioned this Court to review the lower courts' application of well-settled summary judgment law

to the record evidence that was before the District Court. The lower courts' conclusions on the issues of lead's harm to fetuses and the transmission of that harm through women but not men at the blood lead levels involved here are, given the UAW's waiver of the less discriminatory alternatives issue, outcome-determinative under either a BFOQ or a business necessity analysis. And in any event, these complex questions are extremely fact-bound, have already been closely scrutinized by two federal courts,[32] and do not warrant this Court's plenary review.

V. Certiorari Should Be Denied Given The Unique Factual And Procedural Posture Of This Case.

Finally, the suggestion that the Court of Appeals' decision somehow might foreclose 20 million industrial jobs to women, and thereby constitutes "the most important" Title VII case *ever* decided by *any* court, is hyperbole. Pet. 14, 27-28 (quoting Judge Easterbrook's dissent below). The Court of Appeals emphasized there is no room in the law for stereotyped characterizations of the sexes; fetal protection programs must rest on "convincing scientific evidence" rather than myths and assumptions. Pet. App. 53a. The court's decision by its terms "obviously" can be applied in other circumstances only if the "same rigid testing and research" can "conclusively establish[ ] the grave risk" demonstrated here. Pet. App. 59a n. 43. Even with respect to the dangers of this *one* substance in this *one* company, the decision is based upon the "scientific data available as of this date" and the conceded inability of this employer to reduce lead exposure to levels that would eliminate substantial risks to fetal life. Pet. App. 9a, 36a, 59a n. 43.

Moreover, although the analytical issues discussed above might well be significant in the future fetal protection cases that surely will come before this Court, the unusual posture of *this* case renders it an inappropriate candidate for consideration of those issues:

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[32] *Cf. NCAA v. Board of Regents*, 468 U.S. 85, 98 n. 15 (1984); *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980).

a. Although the UAW complains about the status of the summary judgment record, any shortcomings in that record result from the UAW's own concession below that substantial fetal risk "is not one of the disputed issues," its decision that it would "not respond" to Johnson Controls' evidence that there were no adequate but less discriminatory alternatives, and its strategic choice not to take more discovery because it would not be "good tactics to expose your case prematurely at the deposition stage" in preparing to resist a summary judgment motion. (The quotes all are from the UAW's brief to the Court of Appeals, pp. 36-38 & n. 14.) Most Title VII litigants can be expected to preserve issues they care to pursue and to develop a record they consider appropriate; courts should not encourage otherwise.[33]

b. The UAW waived the adequate but less discriminatory alternatives issue before the Seventh Circuit. *See* Part III *supra*. This Court should not consider the permissible scope of a fetal protection policy in a case where the issue of feasible alternatives to that policy has been waived.

c. The Court of Appeals' alternative holdings render the analytical differences among courts abstract and immaterial to the resolution of *this* case; the petition in this respect is nothing more than a request for an advisory opinion.

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[33]Perhaps it was the UAW's remarks quoted in text that prompted the Court of Appeals to make this observation: " 'A district court need not scour the record to make the case of a party who does nothing. . . . [C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course.' " Pet. App. 31a (*quoting Herman v. City of Chicago*, 870 F.2d 400, 404 (CA7 1989)). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole").

CONCLUSION

For all of the foregoing reasons, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated this 1st day of March, 1990.

Respectfully submitted,

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No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent, Johnson Controls, Inc., while opposing the grant of certiorari, does not take issue with the central grounds militating in favor of plenary review developed in our petition.

(a) Johnson Controls concedes, as it must, that the courts of appeal *are* in substantial disarray concerning the appropriate Title VII standard to be applied in judging the validity of employer fetal protection policies that exclude substantially all women from job opportunities. Specifically, respondent agrees that

> although *Wright* [*v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982)] and *Hayes* [*v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984)] had allocated the burden of persuasion to the employer on the issues of substantial fetal risk and whether transmission of that risk was confined to the mother, the court below [held] that . . . the ultimate burden of persuasion . . . remained with [the plaintiff]. [Respondent's Brief in Opposition ("Br. Opp.") 17].

In addition, respondent recognizes that the court below held that "Johnson Controls' policy was also entirely lawful pursuant to a BFOQ defense, which *Wright* and *Hayes* had declined to follow." Br. Opp. 18. And respondent concedes as well that these "analytical issues . . . might well be significant in the future fetal protection cases." Br. Opp. 25.

(b) Johnson Controls, moreover, does not respond to our demonstration that the Seventh Circuit's alternative holdings here are each squarely in conflict not only with those of other courts of appeal, but also with several cases in this Court, notably *Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989), *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702 (1978), and *Western Airlines v. Criswell*, 472 U.S. 400 (1985), and with the current position of the Equal Employment

Opportunity Commission, the agency charged by Congress with initial enforcement of Title VII.[1]

(c) Nor does Johnson Controls refute our showing (Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Pet. Cert." at 27-30) that given the number of hazards that do in fact pose *some* measure of fetal risk in the modern workplace, the questions of whether and under what circumstances employers may exclude substantially all women from jobs posing those hazards are questions of the greatest practical significance to the situation of women in the workplace.[2]

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[1] Johnson Controls does note that the EEOC *previously* was of the view that fetal protection cases should be decided under a business necessity approach. Br. Opp. at 17.

Presently, however, the EEOC has squarely concluded that as applied by the Seventh Circuit, a business necessity framework "is wholly inconsistent with settled Title VII law." Pet. App. 135a. Moreover, while the EEOC intends henceforth to investigate fetal protection cases on the premise that a bfoq defense *may* be applicable, the Agency recognizes that the issue is ultimately one for the courts, and that there is a circuit conflict on this question. Pet. App. 135. Finally, the EEOC recognizes that the Seventh Circuit *applied* the bfoq defense in a manner inconsistent with the decision of this Court in *Western Airlines v. Criswell, supra*, and that of the Fifth Circuit in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). Pet. App. at 136a-137a; 138a & n.11; 144a.

[2] Respondent does suggest that the court of appeals answer to these questions is of limited practical significance since the court below validated only fetal protection policies based on actual proof of a risk to fetal health, not merely "myths and assumptions". Br. Opp. 25. However, the ruling at issue does *not* require the employer to prove a risk to fetal health. Rather, under the Seventh Circuit's analysis, the burden would be on the *employee* to prove that there is *no* such risk; given the nature of scientific uncertainty, that opens up the possibility that sex discrimination will be approved in a broad range of circumstances. Furthermore, the kinds of situactions surveyed in the dissents below—ranging from toxic exposures to exposure of health care and child care workers to infectious diseases to exposure of workers to automobile injuries and other physical injuries that can harm the fetus—are not limited to situations in which the risks are only imagined ones.

The hard Title VII questions that must be answered thus go well

Thus, Johnson Controls in effect concedes that the very significant legal questions raised by the Seventh Circuit's decision in this case *do* merit this Court's attention, and seeks to persuade this Court only that the certiorari petition should be denied to " 'await a day when the issue[s are] posed less abstractly'." Br. Opp. 19. As we now show, this case poses the question of the appropriate Title VII standard to be applied in judging exclusionary fetal protection policies as concretely as it will ever be posed. And there is no aspect of the decision below, or of the history of this litigation, that will in any way impede this Court's ability to resolve the fundamental and critical gender-based discrimination issues posed here.

2. Johnson Controls maintains, first, that given the court of appeals' alternative holdings, resolution of the central issues presented in this case—whether a bfoq or business necessity defense applies, what the elements of the applicable defense or defenses are, and how the burdens of persuasion are to be allocated—cannot affect the outcome and are therefore mere abstractions. Br. Opp. 18-19.

That assertion is simply wrong. As one might expect, the eleven judges of the Seventh Circuit, sitting en banc, were not simply wasting their valuable time by debating at length abstract legal standards, inapplicable to the case

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beyond whether there is scientific evidence of *some* level of fetal risk to include: what level of risk, if any, would justify the *entire* exclusion of women who cannot prove infertility (and not just pregnant women); whether fetal risk can be treated for Title VII purposes as a category unto itself, without regard to other risks to health caused by the same occupational circumstances; and which party, the employer or the excluded employee, prevails where, as is often the case, there is scientific uncertainty as to the precise level of risk, the question whether the risk is confined to fetuses carried by female workers, or the possibility of limiting the risk.

The point of the matter for present purposes is that the legal rules adopted by the Seventh Circuit for answering these question are likely to provide employers in the future with broad authority to exclude many women from job opportunities.

before them. Rather, the Seventh Circuit's choices among the various analytic approaches available *did* directly determine the outcome of this case in that court. Consequently, the decision of this Court after plenary consideration upon the question presented for review would certainly have a " 'meaningful' result on the outcome in the case at hand.' " *Cf.*, Br. Opp. 19.

For example, if this Court, after plenary consideration, were to adopt the view of Judges Easterbrook and Flaum, and to hold (1) that this case must be analyzed as a disparate treatment case; and (2) that the only defense available in such a case—the bfoq defense—cannot as a matter of law apply to a fetal protection policy, then the summary judgment granted by the district court and affirmed on appeal would have to be reversed.

Concommitantly, if the Court, after examining the issues on the merits, were to conclude, as did Judges Posner and Cudahy below, 1) that this case must be analyzed as a disparate treatment case; 2) that under certain circumstances a bfoq defense *can* apply to justify a fetal protection policy; and 3) that the Seventh Circuit majority misapprehended the elements of that very narrow defense, and therefore erroneously affirmed the judgment in favor of the employer, the result on the merits would be to reverse the summary judgment for defendant *and* to remand for trial.

Alternatively, this Court might, after considering this case in full, concur in the conclusions of the Eleventh and Fourth Circuits, in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) and *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), that as a matter of law no bfoq defense applies to fetal protection policies *but* that an alternative defense is available under Title VII. If so, the Court would then have to address the questions of the elements of that defense, and of the allocation of burdens of persuasion within that defense. Depending upon the Court's answers to those two questions, the judgment below might be affirmed, or it might be reversed.

Finally, this Court, after plenary review, might agree in every respect with the alternative legal holdings of the Seventh Circuit majority, and might therefore reach the same end result in this case. But this possibility (which, for reasons indicated in the certiorari petition, is quite remote) surely does not mean that the *legal* issues in this case are of only "theoretical" significance. *Cf.* Br. Opp. 18. Rather, it is usually true, when this Court hears a case, that the Court *may*, after considering all the contentions of the parties on the questions presented for review, ultimately conclude that the court below did not err in any respect, and that the result reached below should therefore stand. Such an outcome does not make the questions presented any less worthy of review than a reversal, or turn the Court's opinion on the merits into an "advisory opinion." *Cf.* Br. Opp. 18.

3. Johnson Controls also insists that the court of appeals' conclusion that a *plaintiff* may have to bear the burden of persuasion on an employer's defense to a charge of facial sex discrimination does not merit this Court's review, despite the conflict on that critical practical issue with the Fourth Circuit in *Wright*, *supra*, the Eleventh Circuit in *Hayes*, *supra*, this Court in *Price Waterhouse v. Hopkins*, and the EEOC in its recent policy statement. As respondent sees that matter, because the Seventh Circuit reached the same *result* under the bfoq defense, while placing the burden of persuasion on the employer, as under the business necessity defense while placing the burden of persuasion upon the plaintiff, it must follow *despite* the court of appeals explicit statements to the contrary, that where the burden of proof is placed does not matter. Br. Opp. 18.[3] The flaw in this reasoning is obvious: Johnson Controls *wrongly* assumes that the elements of the two defenses are the same.

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[3] The Seventh Circuit devoted several pages to the burden of persuasion question, and expressly stated that in its view, the allegation of the burden of persuasion is critical to the outcome that court reached on the business necessity defense. Pet. App. 30a-35a.

In fact, the bfoq defense, as conceived by the court of appeals, *does not include any inquiry into the question whether "the risk of transmission of potentially harmful lead exposure to unborn children is substantially confined to fertile female employees."* Pet. App. 33a; *see* Pet. App. 50a-59a. And it was with regard to this precise inquiry that the allocation of the burden of persuasion was dispositive below with regard to the business necessity defense. *See* n.3, *supra.* Since the two defenses, according to the court of appeals, have different elements as well as different burdens of persuasion, it is improper to extrapolate, as respondent would, from the fact that the court below concluded that respondent carried its bfoq burden of persuasion, that the court below would have concluded that respondent would have carried its business necessity burden of persuasion.

Consequently, had the Seventh Circuit agreed with the view of the Eleventh and Fourth Circuits that no bfoq defense is available for fetal protection policies, and further agreed with those courts as to the placement of the burden of persuasion on the alternative, business necessity theory, the outcome of this case below may well have been different. In sum, the two circuit conflicts identified in our certiorari petition involve critical questions that *do* influence the results in fetal protection cases and *were* central to the result in this case in the court below.

4. Respondents' final attempt to persuade this Court that this case is somehow defective as a vehicle for deciding the important questions presented for review is the repeated assertion that the UAW in the proceedings below waived the right to judicial consideration of an issue necessarily critical to a challenge to an employer's fetal protection policy. Br. Opp. 12, 19-21, 25. In fact, the issue upon which a waiver is asserted is in no way critical to the resolution of this case at this juncture, nor was there a broad waiver below as to any present relevant issue.[4]

[4] As respondent notes in a variation on its "waiver" point, we do not argue in our *certiorari* petition that if the court below is right on the law, the affirmance of summary judgment is wrong because there are contested factual issues. We do not make any such argument not because we believe that there are no such factual issues but because we believe that there is no certworthy dispute in that regard. And as already pointed out, respondent is plainly wrong in its repeated refrain that our focus on whether the court below got the law right reduces this live contested case to an abstract controversy.

The question as to which Johnson Controls contends the UAW made a critical concession is the availability of feasible alternatives to the challenged fetal protection policy. That issue, according to the court of appeals, is the *third* possible element of a business necessity analysis as applied to fetal protection policies, and, as such, need be addressed only if the employer prevails as to the first two elements. *See* Pet. App. 38, relying upon *Wards Cove Packing Co. v. Atonio*, — U.S. —, 109 S. Ct. 2115, 2126-27 (1989). For four reasons, the UAW declination to present affirmative evidence on this far-down-the-line question is of the most minimal significance at this stage of the proceedings.

First, the UAW simply declined to come forward with evidence on the question of feasible alternatives, for purposes of contesting respondent's *summary judgment* motion. The Union in no way waived its right to present such evidence at trial if the summary judgment is reversed, as we believe it should be, and the case remanded for trial.

Second, at the time the UAW made its litigation decision the district court had held that a fetal protection purpose can *not* constitute a bfoq. The Union therefore did not on appeal address the question whether, if applicable, the elements of a bfoq defense had been made out. Because it was the court of appeals that for the first time in this litigation indicated that a bfoq defense may be applicable, the UAW cannot be held to have waived the legal contention that the employer had failed to meet *its* burden of proving the proper elements of the bfoq defense, in-

cluding, *inter alia*, whether it is "impossible or highly impractical" to deal with employees on an individualized basis. *Western Airlines v. Criswell*, 472 U.S. at 414.[5]

Third, the UAW would be obliged to *come forward* with evidence on the feasible alternatives issue only if this Court were to affirm the court of appeals' basic premise that this case, despite explicit, gender-based discrimination, can be analyzed as if it involved a neutral policy with only a disparate impact on women. Our basic position, however, is that the entire disparate impact/business necessity theory is inapplicable here. If this view is adopted, then there would be no reason to reach the application of the elements of the business necessity defense, and the purported waiver would be irrelevant.

Fourth, even if this Court were to agree with the Court of Appeals that disparate impact analysis is appropriate, that would still leave the question whether the two elements of the business necessity defense that arise *prior to* the feasibility question were made out on the present record. And as to those—particularly as to whether lead at the levels of exposure here at issue causes fetal harm to the offspring of male employees, or harm to the health of adult employees—the court of appeals placement of the burden of proof upon the UAW was, as recounted above, both in error and critical to its result. Thus, unless this Court were to further agree with the court of appeals that contrary to established Title VII law, this Court's decision in *Price Waterhouse v. Hopkins*, the views of the other circuits that have addressed the issue, and the EEOC, a *plaintiff* can be required to bear the burden of any scientific uncertainty concerning the

[5] Indeed, the court of appeals did *not* treat the Union as having waived any aspect of the bfoq question. Rather, the court below analyzed at length on the merits the question of whether the fetal protection policy here was reasonably necessary (albeit, in our view, erroneously and without regard to the standards established by this Court) Pet. App. 52a-55a; *see* Pet. Cert. 23-24 & n.16.

effect of a toxic substance upon male employees and their offspring, there would again be no reason to address the feasible alternatives issue.[6]

The central contention in our certiorari petition is that, given the conflict among the circuits, with this Court's cases, and with the EEOC generated by the court of appeals basic *legal* analysis and the importance of the questions presented to the future of women's employment prospects, the case merits plenary review. Respondents suggestion that this case cannot sensibly be decided without addressing a feasible alternative issue on its particular facts grossly distorts what is at stake. In truth, there is no possibility that such a factual issue will impinge on this Court's consideration of the central and critical *legal* issues presented for review.[7]

[6] Contrary to Johnson Controls' contention, Br. Opp. 22-24, the court of appeals treated the validity of animal studies in generic terms and not smiply on that court's assessment of the validity of the *particular* animal studies submitted. The court below explicitly recognized that the UAW *did* present expert testimony that "animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure." Pet. App. 34a. That court nonetheless concluded that the UAW's witnesses' opinions based on animal studies could be ignored because of "the wide chasm between the results of animal studies and a conclusion of genetic harm allegedly transmitted through the male human being," and faulted the UAW on the ground that the Union did not (although in fact it did) "present[] any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure." Pet. App. 34a. The fair reading of these passages, as dissenters below and the EEOC have recognized, is that the Seventh Circuit ruled *as a matter of law* that the Union could not sustain its burden of proof on the male mediation issue without human studies.

[7] We note that since the filing of the certiorari petition in *Johnson Controls v. California Fair Employment and Housing Commission*, —— Cal. App. 3d —— (Feb. 28, 1989), the California Court of Appeal held Johnson Controls' fetal protection policy, as applied in California, is *invalid* under *state* fair employment law. (Because

CONCLUSION

For the above stated reasons and those set out in the certiorari petition, that petition should be granted.

Respectfully submitted,

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the opinion is not yet generally available, we are lodging copies with the Clerk's Office for the Court's convenience.)

The California statute is ordinarily interpreted to parallel Title VII except " '[w]here Title VII precedent does not appear sound or would conflict with the essential purposes of the Act' " Slip op. at 30. The California Court of Appeal so fundamentally disagreed with the legal analysis of the opinion below, however, both as to the scope of the bfoq defense and as to the availability of an alternative defense, for reasons similar to those expressed in the dissents below and in our certiorari petition, that it refused to follow the Seventh Circuit's conclusions as to the validity of the *very same policy* at issue here. Slip Op. at 36, 40. In so holding, the California court relied upon the EEOC's recent policy guidance document, and noted as well the disarray among the federal courts that have addressed fetal protection issues. Slip Op. at 30 n.7, 42-48.

Thus, the conflict between the decision below and established Title VII principles has now contributed to a stiuation in which a *single* fetal protection policy is valid under federal law but invalid under state law, although the state usually attempts to avoid such a conflict.

FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 29, 1990
CERTIORARI GRANTED MARCH 26, 1990

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, v. Johnson Controls; Case No. 84-C-0472

DATE	NR	ENTRY
04/06/84	1	Complaint; Summons issued
06/01/84	8	Answer
11/27/84	13	Affidavit of Miriam R. Horowitz in Support of Motion for Class Certification with Attached Exhibits
11/30/84	17	Affidavit of Eunice Williams
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12/05/84	19	Affidavit of Anna May Penney
12/07/84	20	Affidavit of Donald Penney with Exhibit
02/25/85	23	ORDER; Granting Plaintiff's Motion for Class Certification
08/14/86	34	Defendant's Motion for Summary Judgment
08/14/86	36	Affidavit of Paul B. Hammond
08/14/86	37	Affidavit of Jean Beaudoin
08/14/86	38	First Affidavit of Stanley S. Jaspan
08/14/86	39	Second Affidavit of Stanley Jaspan
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08/14/86	41	Affidavit of M. Donald Whorton
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09/10/86	47	Affidavit of Ralph O. Jones
09/18/86	48	Plaintiff's Motion to File *Instanter* Supplemental Brief in Opposition to J. Controls' Motion for Summary Judgment and Affidavit
09/18/86	49	Proposed Supplemental Brief as above

DATE	NR	ENTRY
09/18/86	50	Proposed Affidavit of Michael Silverstein, M.D.
09/18/86	51	Defendant Johnson Control's Reply Brief in Support of Motion for Summary Judgment
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10/02/86	53	Third Affidavit of Stanley S. Jaspan
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09/26/89		Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit

[DISTRICT COURT OPINION AS AMENDED]

UNITED STATES DISTRICT COURT
E.D. WISCONSIN

No. 84-C-472

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Plaintiffs,

v.

JOHNSON CONTROLS, INC.,
Defendant.

Jan. 21, 1988

As Amended Feb. 24, 1988

Miriam Horwitz, Zubrensky, Padden, Graf & Maloney, Milwaukee, Wis., for plaintiffs.

Stanley S. Jaspan, Foley & Lardner, Milwaukee, Wis., for defendant.

DECISION AND ORDER

WARREN, Chief Judge.

This case presents the issue of whether a fetal protection policy which prohibits women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead [1] levels will rise above 30

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[1] A word frequently used by the experts is blood lead. Blood lead is a measure of the amount of lead that is present in the circulation where venous blood is drawn.

micrograms violates Title VII of the 1964 Civil Rights Act. Defendant, Johnson Controls, Inc. ("Johnson Controls") has filed a motion for summary judgment. After carefully reviewing all the submissions from both parties and the law on this issue, it is the Court's conclusion that the fetal protection policy at issue does not violate Title VII, and the defendant's motion for summary judgment is hereby GRANTED.

I. Background Facts

Defendant has seventeen plants in its battery division. Fourteen of these plants manufacture batteries. Lead is the principal active material used in batteries. It is the main ingredient in the paste which forms the plates of the batteries, and it forms the structure for all the conductive elements in the battery for transmitting current.

On February 25, 1985, as a result of a stipulation between the parties, the Court certified the following class: all past, present and future production and maintenance employees employed in bargaining units represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and/or one of its Local Unions at Defendant's Battery Division plants located in Garland, Texas; Holland, Ohio; Fullerton, California; Owosso, Michigan; Louisville, Kentucky; Texarkana, Arkansas; Bennington, Vermont; Middeltown, Delaware; and Atlanta, Georgia, who have been and continue to be affected by Defendant's Fetal Protection Policy implemented in 1982.

The policy at issue was implemented in 1982 by the defendant. The policy excludes women who are capable of bearing children from working in jobs where their blood lead level will rise above 30 micrograms. Women are presumed capable of bearing children until they medically prove contrary. Women who are required to transfer out of jobs because of the policy are paid medical removal protection benefits to compensate for lost earnings. Women who are in positions where their blood lead levels do not rise to 30 micrograms are prohibited from transferring into positions where their blood lead levels will rise above 30 micrograms.

The plaintiffs allege that this policy discriminates against both women and men. Based on this policy plaintiffs allege that there is sex discrimination in recruitment and hiring, job assignments, wages, promotions and transfers within the bargaining unit, seniority, overtime, layoff and recall, demotions, on-the-job training, maternity policies, on-the-job harassment, fringe benefits, and health and safety conditions.

There is no dispute between the parties regarding the fact that excessive exposure to lead can result in significant harm to persons. There is a dispute, however, on the issues of whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females, as opposed to male workers. There is also a dispute as to whether a fetus is more sensitive to lead than a postnatal child. Depositions and affidavits of experts have been submitted by plaintiffs and defendant, and the Court has closely reviewed those documents. Following is a brief summary of the testimony of the experts.

A. Expert Opinions

Dr. Anthony R. Scialli is a practicing physician and director of the Reproductive Toxicology Center. The Center serves as a source of information on the potential reproductive toxicity of environmental and physical agents. Dr. Scialli holds the opinion that because a fetus undergoes extremely rapid development of the internal nervous system during gestation, the fetus is even more sensitive to the effects of lead than a young child. Dr. Scialli further stated that damage of the central nervous system includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities which may be permanent. According to the affidavit,

Dr. Scialli is aware of no studies which show that male blood lead levels of up to 50 micrograms results in any abnormality of offspring, and further that lead does not cause any change in the sperm that would be transmitted to offspring and result in abnormality in the offspring. Finally, the affidavit states that a man with a blood lead level of 50 micrograms would not have an increased risk of fathering a child with abnormalities.

Dr. J. Julian Chisolm who is a pediatrician and director of the Lead Program at the John F. Kennedy Institute set forth the following opinion:

> During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation. The concentration of lead in the fetal tissue increases rapidly during the last trimester of pregnancy. At birth, the fetus generally has the same blood lead level as the mother. However, the fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child. This is particularly true during the latter part of the gestation period when the central nervous system of the fetus is developing very rapidly and is extremely susceptible to the toxic effects of lead. Medical studies released in the last year or two out of Boston, Cincinnati and Port Pirie, South Australia suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents [a] grave risk of permanent harm to the central nervous system of the fetus. The risk of harm to the fetus increases proportionately with the increase of blood lead levels over 10 micrograms. Such harm includes stillbirth, reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral disorders.
>
> There is no medical evidence that lead exposure to the adult, male or female, has any adverse effect on the offspring. Rather, the available medical evidence establishes that it is the exposure directly to the fetus, through the pregnant woman, which causes harm to the offspring.

Likewise, the affidavit of Paul B. Hammon, Professor of Environmental Health at the University of Cincinnati and director of a study currently being conducted in Cincinnati of the effects of lead exposure on children, stated that he was unaware of any human studies which conclude that blood lead levels of up to, and even exceeding, 50 micrograms in the adult male will cause any demonstrable effect on the development of the fetus.

The deposition of Seymore Legator, professor and director of the division of environmental toxicology was submitted wherein Professor Legator states that there is "no question that lead is hazardous to the fetus by embryo exposure" and that children are very sensitive to lead. Professor Legator also stated that lead poses a threat to both men and women, but it is still unknown about male sensitivity, but he recognized that there is a problem and that lead probably causes a genetic lesion during spermatogenesis.

Another physician, M. Donal Whortin, is the Senior Occupational Physician/Epidemologist for a company that conducts research in the areas of occupational and environmental health and is a primary medical consultant for a number of companies. Dr. Whortin holds the opinion that "the current OSHA lead standard of 50 micrograms per deciliter of whole blood should generally protect adults of either sex from significant adverse effects in the various adult systems." Dr. Whortin was a coinvestigator in a 1981 study which compared the quality of the semen of lead exposed workers with non-exposed males. The study discovered no changes in the semen quality of lead exposed workers. Nevertheless, Dr. Whortin stated that recent medical studies have shown that a fetus' central nervous system can be injured by

exposure to blood lead levels of 10 micrograms. Dr. Whortin concluded that the central nervous system of the fetus and not the reproduction systems of the male or female worker is at greatest risk.

The testimony of Charles W. Fishburn was also submitted for purposes of the motion. Dr. Fishburn is a physician and Assistant Clinical Professor at the University of Wisconsin. Dr. Fishburn is certified in occupational medicine. Occupational medicine involves the study of the relationships of injury and disease caused by chemical exposures in occupations. He states that children are particularly sensitive to lead because children do not have a barrier between the brain and the blood. Further, children develop a barrier around the age of five. Until the barrier is developed, if children ingest lead, they can be poisoned immediately. The child also can go into convulsions resulting in damage to the central nervous system.

In a fetus, the central nervous system is one of the first systems that develops and the first to be affected. A fetus gets its blood from the mother and there is no way, according to Dr. Fishburn, to protect a fetus when it is overexposed to lead. Dr. Fishburn states that damage to the central nervous system is apparently permanent.

Michael Silverstein, an Occupational-Health Physician in the Health and Safety Department of the United Auto Workers, is of the opinion that there is no evidence that reproductive risks are different for men and women at equal blood-levels. Furthermore, Dr. Silverstein states that "the toxic effects of lead exposure on human adults is similar and equivalent in impact to that observed in children at equivalent exposure levels." Dr. Silverstein discussed one study published in 1972, Hildebrand, where it was found that male rats with blood levels between 14 and 26 resulted in impotence and a decrease in sperm mobility. Dr. Silverstein stated that it could be speculated that an abnormal sperm could carry damaged genetic material which could result in damaged offspring or functional infertility.

Assistant Professor of Occupational Medicine at the University of Michigan School of Public Health, Kelly Ann Brix, states the conclusion based upon a review article, that there is a clear effect of lead upon the male reproductive tract in mammals.

Ellen Silbergeld, a toxicologist and a senior scientist for the Environmental Defense Fund, holds the opinion that all persons should not be exposed to lead levels above 12 micrograms.[2] Silbergeld also states that there is no evidence that a fetus is more sensitive than a postnatal child. Further, in animals, Silbergeld states, that high doses of lead in the first trimester can cause spontaneous abortion of an embryo. Silbergeld also stated that "a woman may be exposed to lead early in pregnancy and deficits noted in the child after birth, but those deficits might have been associated with the on-going exposure which occurred in the late stages of pregnancy . . . [because] for all purposes there is a continuing exposure to lead even after removal from sources of lead. . . ." Silbergeld estimated that if a person, after exposure to lead is placed in a lead-free environment, the turnover of lead is about 100 days, "so within a year or so there would be a reduction in lead." This time estimate according to Silbergeld is accurate in a lead-free environment, but in the absence of a lead-free environment, there is a continuing exposure to lead.

II. Prior Law

There are essentially two types of Title VII cases: Disparate treatment and disparate impact. Disparate treatment occurs when an employee has been treated less

[2] Silbergeld also states that "I think the blood leads that are called for monitoring are much too high, and I also don't understand why it applies only to women."

favorably because of sex. There are two types of disparate treatment cases: facial and pretextual. "Facial discrimination occurs when an employer adopts a policy that explicitly treats some employees differently from others on the basis of race, religion, national origin, or gender (pregnancy)." *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir.), *reh'g denied*, 732 F.2d 944 (11th Cir.1984). The only defense to a charge of facial discrimination is a bona fide occupational qualification (BFOQ). A second theory under disparate treatment occurs when the employer adopts a facially neutral policy, but which is a pretext for discrimination. A disparate impact suit exists when although a policy is neutral, it has a disparate impact on a protected class. Discriminatory motive is not required, and the defense to an allegation of disparate impact is business necessity.

Only three jurisdictions have reviewed Title VII actions involving the health of the fetus.[3] The Fourth Circuit Court of Appeals was the first circuit court to address the fetal vulnerability program in *Wright v. Olin Corp.*, 697 F.2d 1172, 1177 (4th Cir.1982). Olin Corporation instituted a fetal vulnerability policy which restricted fertile females from jobs which required con-

[3] Despite a lack of case law on this issue, many legal writers have addressed the issue. *See generally*, Comment, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection—But Can They Succeed?*, 20 J. Marshall L.Rev. 747 (1987); Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L.Rev. 353 (1987); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L.J. 577 (1986); Timke, *Exploring the Limits of Legal Duty: A Union's Responsibilities with Respect to Fetal Protection Policies*, 23 Harv.J. on Legis. 159 (1986); Comment, *Fetal Protection Programs under Title VII—Rebutting the Procreation Presumption*, 46 U.Pitt.L.Rev. 757 (1985); Note, *Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C.L.Rev. 1067 (1984); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo.L.J. 641 (1981).

tact with toxic chemicals. The Fourth Circuit determined that the disparate treatment analysis was inappropriate for this particular case because under disparate treatment, the plaintiff must show that the employer intended to treat the class less favorable. The *Wright* court stated:

> Here the claim is that the intention to "treat less favorably" is manifest in the very nature of the program and the factual defense is not truly aimed at rebutting that indisputable fact but at justifying it on the basis that the purpose behind it was benign in relation to the claimant's sex.

697 F.2d at 1185 n. 20. The court stated that the disparate impact theory with the business necessity defense was appropriate. The court held that the fetal protection policy establishes a prima facie case of discrimination. The court went on to find, however, that a business necessity defense existed in this situation by analogizing the fetus to invitees and licensees who are legitimately on the business premises. The court stated that "the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon the employer's premises." 697 F.2d at 1189.

The Fifth Circuit was the next circuit to address the issue of fetal protection in *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir.1982). In *Zuniga*, a female x-ray technician was terminated from employment because of the effects of exposure of the fetus to x-ray radiation and the concern of future liability of the hospital to the child. The Fifth Circuit found that the plaintiff rebutted the business necessity defense by showing that the hospital failed to utilize less discriminatory means. *Id.* at 992.

The next circuit to address this issue was the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir.), *reh'g denied*, 732 F.2d 944 (11th Cir. 1984). *Hayes* also involved a plaintiff who was a female

x-ray technician and who was fired because she was pregnant. The Eleventh Circuit reviewed the case under both the disparate treatment analysis and the disparate impact analysis. Under the disparate treatment analysis, the court did not find that an analysis of pretextual discrimination was appropriate because the plaintiff was fired because of her pregnancy. A BFOQ defense could not be established because there was no evidence that plaintiff's pregnancy would interfere with her ability to perform her job and the hospital failed to provide evidence that the level of radiation to which the plaintiff would be exposed posed an unreasonable risk of harm to the fetus.[4]

The Court, however, found that a facial discrimination analysis was proper. A presumption of facial discrimination applies to women. "That presumption may be rebutted, however, if the employer can show that although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees." *Hayes*, 726 F.2d at 1548.

The *Hayes* court went on to state that even if the employer proves that the policy is justified in a scientific basis and is not required to protect the offspring of male employees, the policy still has a disproportionate impact on women; only women are excluded from the jobs. The *Hayes* court stated that the plaintiff established an au-

[4] The *Hayes* court further noted:

> Because the Hospital failed to prove its policy was necessary we need not reach the factual issue of whether x-ray radiation affects the offspring of employees only through pregnant women, or whether similar effects can occur from exposure to males. Documents cited by amici do suggest that radiation induced mutations can pass to offspring from male sperm, but neither party developed on this issue at trial.

Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir.), *reh'g denied*, 732 F.2d 944 (11th Cir.1984). The parties in this case have, however, submitted affidavits and depositions regarding the effects males exposed to lead and their offspring.

tomatic case of disparate impact for which the defendant must raise a business necessity defense.

The business necessity defense is generally related to job performance. The *Hayes* court recognized that fetal protection does not have any relation to job performance. The court, however, did not find that the business necessity defense does not apply, but rather found that "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1552-53 n. 15. The court went on to further hold that the business necessity defense "automatically" applies because at the point where the court undertakes a disparate impact analysis, the employer "has *already* proved—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men." *Id.* at 1553. If a business necessity defense exists, the burden then shifts to the plaintiff to show that there are no "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with a less adverse impact on one sex." *Id.* In brief three elements were set forth by the *Wright* court for reviewing a fetal protection policy:

(1) that a substantial risk of harm exists;

(2) that the risk is borne only by members of one sex; and

(3) that the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex.

Id. at 1554. If these three elements are met, the policy does not violate Title VII.

III. Analysis

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A factual dispute will not preclude summary judgment unless the fact is "outcome determinative according to the governing law." *Reardon v. Wroan*, 811 F.2d 1025, 1027 (7th Cir.1987).

A. Disparate Treatment

Reviewing this case under a disparate treatment analysis results in the conclusion that the plaintiffs have established a prima facie case of discrimination because the fetal protection policy excludes women from positions which men are not excluded from. The *Hayes* court stated that there is a "*presumption* that if the employer's policy by its terms applies only to women, then the policy is facially discriminatory." 726 F.2d at 1548. This presumption is rebutted by demonstrating that there are "significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, that fertile women workers though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for the purpose." *Wright*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548.

In the present case, there is a disagreement among the experts regarding the effect of lead on the fetus and the effect of lead on male and female reproduction. This dispute, however, is not outcome determinative. The Fourth Circuit stated:

> To establish the requisite degree and cast of the risk of harm, it is not necessary to prove the existence of a general consensus on the points within the qualified scientific community. If suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and

> that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

The expert opinion in this case demonstrates that there is a considerable body of opinion which holds that lead is hazardous to the fetus through embryo exposure, and a fetus that is exposed to lead carries the significant risk that the central nervous system will be damaged. Further, a significant opinion exists which holds that the fetus cannot be protected when it is overexposed to lead from the mother's blood. Although plaintiffs state that today "reproduction is now largely discretionary," Dr. Ghisolm stated that many pregnancies are unplanned. It is very likely that a women could be pregnant without being aware of it. If this woman has a blood lead level of above 10 micrograms, her child could be born with abnormalities even if, after she discovers that she is pregnant, she removes herself from the lead environment because the fetus has been exposed to lead during early development when the central nervous system was developing. Also, lead remains in the body for a significant period of time. Furthermore, lead builds up in the blood, soft tissues, and bones. If the lead leaves the blood and soft tissues, lead still remains in the bones; it takes even longer for the lead to leave the bones. According to the experts, it takes about two or three times as long for the blood leads to decrease as it did for such blood levels to increase.

Further, a fetus that has been exposed to lead may be stillborn. The fetus may have a reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral disorders. This is a significant and unreasonable risk of harm to the fetus. The fetal protection policy is necessary. The employer has carried its burden of "showing that the body of opinion believing that significant risk

exists is so considerable 'that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.'" *Wright*, 697 F.2d at 1191.

The next step to consider is whether the hazard does not apply to the offspring of male employees. In *Hayes*, the court stated, "[i]n those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women." 726 F.2d at 1549.

Expert opinion has been provided which holds that lead also affects the reproductive abilities of men and women. Some experts hold that these effects are as great as the effects of exposure of the fetus. Although the Court believes that men, women, and fetuses should be protected from lead exposure, there is expert opinion that fetuses are subject to a greater risk because the fetuses central nervous system is developing, and further, a fetus could be exposed to lead without the mother's knowledge. One legal writer has stated that "an employer may be justified in excluding all women of childbearing capacity from working with compounds that cause reproductive injury to the female worker prior to her knowledge of pregnancy." Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 Santa Clara L.Rev. 353, 370 (1987). Although adults of both sexes may be subject to equivalent susceptibility of reproduction hazards, a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults. The Court simply cannot overlook this possibility of severe harm only to the fetus. As a concern for society and future generations this Court must uphold the fetal protection policy. The fetus deserves special protection from lead. If women always knew when they were going to become pregnant, the mother could remove herself from the lead environment; this predictability does not

always occur with accuracy. "Unlike abortion, in which a woman makes a knowing decision to end fetal life, workplace hazards may harm a worker's reproductive system on unborn offspring without his or her knowledge or consent." Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect to Fetal Protection Policies*, 23 Harv.J. on Legis. 159, 167 (1986). Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory.[5] Further, plaintiffs have failed to establish that there is an acceptable alternative policy which would protect the fetus. Perhaps with the improved development of pregnancy testing, an alternative may develop, but even if a pregnant woman is removed from lead exposure once she is aware of the pregnancy, the lead level does not decrease as quickly as it built up; lead remains in the body for some time. Thus, the fetus would be exposed to lead even if the mother is removed from the lead environment.

Additionally, based upon the affidavits submitted, it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels. Since 1978, the defendant has spent approximately 15 million dollars on environmental engineering controls in its Battery Division Plants. Although plaintiffs state that "in the opinion of Toxicologist Ellen Silbergeld, the technology exists to reduce blood lead levels below 15 micrograms," Ms.

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[5] Because this Court has determined that the lead fetal protection policy is not facially discriminatory, this Court does not have to undertake a bona fide occupational qualification's (BFOQ) analysis. "Under traditional analysis, the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job, duties that Title VII defines as 'necessary to the normal operation of the particular business or enterprise.'" *Hayes*, 726 F.2d at 1549. Although not required to address, this Court merely notes that an employee's job performance would not be affected by pregnancy.

Silbergeld's deposition transcript reveals that she is not aware that there is technology which exists that would reduce blood lead levels at Johnson Controls to 12 micrograms. Plaintiffs have failed to demonstrate that acceptable alternative policies exist.

B. Disparate Impact

Although the fetal protection policy is facially neutral, it has a disproportionate impact on women; thus, a prima facie case of disparate impact exists. The employer's only defense in this situation is a business necessity defense, but "[o]ne problem with business necessity as defined under traditional Title VII analysis, but applied in the context of an employer's fetal protection program, is the requirement that the employer's policy be related to job performance because fetal protection does not, in a strict sense, have anything to do with job performance." *Hayes*, 726 F.2d at 1552. The *Hayes* court expanded the business necessity defense to cover the fetal protection case because "the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring. . . ." *Id.* at 1553. This Court agrees. There is a business necessity to protect fetuses. The fetus, from exposure to lead, faces a substantial risk of harm, and this exposure exists only for pregnant women. Men simply cannot expose a fetus to lead in the same way women can. The *Wright* court analogized fetuses to licensees and invitees, and stated that "[c]ertainly the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises." 697 F.2d at 1189. In view of the fact that a significant risk exists for fetuses exposed to lead, the fetuses safety cannot be ignored. A business would not expose its customers to lead. Furthermore, although not of primary importance, a business should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed

to lead. Thus, the business necessity defense applies to a lead fetal protection policy. There is a general societal interest in protecting the health of fetuses and children.

C. Toxic Substance Control Act (TSCA)

Plaintiffs argue that although there is a societal interest in fetal safety, the obligation of protecting society's interest has been delegated to the Environmental Protection Agency in the TSCA. The TSCA requires producers of chemicals to report to the EPA information about substances which pose a substantial risk. The EPA is required to take regulatory action within 180 days after receiving information that a substantial risk may exist. If the EPA determines that a substantial risk exists, the EPA can regulate the substance. One commentator has criticized the effectiveness of the Act:

> Despite its broad scope, TSCA's usefuless in dealing with fetal toxins, teratogens, and mutagens has been limited. The EPA has substantial discretion under the statute, and the agency has tended to exercise this discretion to avoid active regulation. The EPA has announced that it intends to regulate at most two or three substances per year, with relevant studies taking up to two years per substance to prepare. The Office of Management and Budget under the Reagan administration has been relentless in criticizing the EPA's modest efforts to regulate dangerous chemicals. Consequently, fetal toxins, mutagens, and teratogens have escaped regulatory review.

When the EPA does examine a chemical, it may consider the availability of substitutes and the economic consequences of regulation before making a pre-regulation determination that the chemical poses an "unreasonable risk." Furthermore, the promulgation of regulations involves consideration not only of their economic consequences but also of the avail-

able level of technology. A consideration of both these factors would probably lead to an acceptance of hazards that may not pose significant risks to employees but do pose grave risks to their unborn children.

Timko, *supra*, p. 16, at 172. Based upon the foregoing, the Court is not persuaded that the TSCA is protecting fetuses from lead exposure. Furthermore, eliminating the use of lead in battery production has not yet been achieved. The use of lead is still necessary at this point. The company is, however, continuing to "study, develop, and implement engineering controls to reduce the lead exposure and blood lead levels of all employees." Beaudoin Affidavit, ¶ 17. Although no evidence has been presented to the Court demonstrating that the EPA has reviewed the lead situation at issue here, it is unlikely that the EPA would prevent the use of lead in the absence of a substitute. Further, because the TSCA is gender neutral, it would fail to protect the fetus which faces a significant risk from lead exposure because male and female are treated equally under the Act.

IV. Conclusion

Society has an interest in protecting fetal safety. Lead poses a substantial risk of harm to the fetus. This risk is born only by women who are pregnant or will become pregnant. The plaintiffs have not shown that there is an acceptable alternative that would have a lesser impact on females. Johnson Controls fetal protection policy does not violate Title VII. Stillbirths, reduced birth weight and gestational age, and retarded cognitive development are abnormalities too serious for this Court to find unimportant.

Defendant's motion for summary judgment is hereby GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 84-C-0472

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its LOCAL UNIONS Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516, and 1719, and LOIS SWEETMAN, LINDA BURDICK, ELSIE NASON, MARY ESTELLE SCHMITT, SHIRLEY JEAN MACKEY, MARY CRAIG, ANNA MAY PENNEY and DONALD PENNEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JOHNSON CONTROLS, INC.,

Defendant.

COMPLAINT

I.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 42 USC § 2000e-5(f), USC § 1337, and 28 USC § 1343(3), (4). This action is brought to remedy discrimination because of sex in terms, conditions and privileges of employment, hiring and compensation in violation of federal statutes. The action arises under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et. seq.*

2. The unlawful practices alleged herein have been promulgated by the defendant company, Johnson Controls, Inc., throughout its Globe Battery Division.

3. Venue herein is proper, as defendant, Johnson Controls, Inc., (hereinafter "the Company") has its principle place of business in Milwaukee, Wisconsin.

4. The plaintiffs, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "UAW"), and its Local Union Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516, and 1719, duly filed a charge with the EEOC alleging that the defendant company has, through the implementation of its so-called "Fetal Protection Policy," discriminated on the basis of sex against all females in hiring, wages, terms, conditions, and privileges of employment. Further, the UAW alleged the Fetal Protection Policy discriminates against male employees on the basis of sex by failing to provide reproductive health hazard protections equal to those provided to female employees.

5. The plaintiffs, Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney and Donald Penney each duly filed charges against defendant Johnson Controls, Inc., with the Equal Employment Opportunity Commission (hereinafter "EEOC") complaining of the various acts of sex discrimination committed by defendant pursuant to its "Fetal Protection Policy." The plaintiffs were each notified by the EEOC, pursuant to Section 706(f)(1) of the Civil Rights Act of 1964 as amended, 42 USC § 2000e-5(f)(1) of their right to institute suit. The dates of notice of right-to-sue are as follows:

Name of Plaintiff	Date Right-to-Sue Letter Received
Lois Sweetman	1/12/84
Linda Burdick	3/22/84
Elsie Nason	3/22/84
Mary Estelle Schmitt	3/22/84
Shirley Jean Mackey	3/22/84
Mary Craig	3/22/84
Anna May Penney	3/22/84
Donald Penney	3/22/84
UAW	3/22/84

6. This Complaint has been filed within ninety (90) days of the receipt of said notice of Right-To-Sue letters.

7. All conditions precedent to the institution of this lawsuit have been met.

II.

PARTIES

8. The plaintiff, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization engaged in an industry affecting commerce within the meaning of 42 USC § 2000(d), (e) and exists, in whole or in part, for the purpose of dealing with the company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms and conditions of employment. The UAW has more than 25 members.

9. Together with its local unions, the UAW is the collective bargaining representative of employees at the following facilities owned and/or operated by defendant Company: Owosso, Michigan, Plant and Clerical Units; Louisville, Kentucky, Plant and Clerical Units; Bennington, Vermont; Atlanta, Georgia; Dallas, Texas; Fullerton, California; Texarkana, Arkansas; Middletown, Delaware.

10. The UAW is a "person" within the meaning of 42 USC § 2000e-(a). The UAW's heaquarters are located at 8000 East Jefferson Avenue, Detroit, Michigan 48214.

11. UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719 each represent bargaining units of Johnson Controls, Inc., Globe Battery Division employees. Each local union is a labor organization engaged in an industry affecting commerce within the meaning of 42 USC § 2000e-(d)(e), and represents employees at the below-specified facilities for the purpose of dealing with the defendant concerning wages, hours

and other terms and conditions of employment. Each Local Union is a "person" within the meaning of U.S. § 2000e-(a).

(a) Local Union No. 12, at 2300 Ashland Avenue, Toledo, Ohio 43620, represents production and maintenance employees at the Company's plant in Holland, Ohio.

(b) Local Union No. 119, at 3100 West Walnut—Apt. 233-11, Garland, Texas 75042, represents production and maintenance workers at the Company's plant in Garland, Texas.

(c) Local Union No. 509, at 2432 Kellogg Park Drive, Pamona, California 91768, represents production and maintenance workers at the Company's plant in Pamona, California.

(d) Local No. 754, at 1824 Corunna Avenue, Owosso, Michigan 48867, represents production and maintenance workers and office/clerical technical workers at the Company's plant in Owosso, Michigan.

(e) Local Union No. 1283 at 5505 Walnut Way, Louisville, Kentucky 40229, represents production and maintenance workers at the Company's plant in Louisville, Kentucky.

(f) Local Union No. 1343, at 2412 Mamie, Texarkana, Texas 75501, represents production and maintenance workers at the Company's plant in Texarkana, Arkansas.

(g) Local Union No. 1371, at Silk Road, Bennington, Vermont 05201, represents production and maintenance employees at the Company's plant in Bennington, Vermont.

(h) Local Union No. 1516, at P.O. Box 241, Middletown, Delaware 19709, represents production and maintenance employees at the Company's plant in Middletown, Delaware.

(i) Local Union No. 1791, at 459 Utoy Circle, Atlanta, Georgia 30331, represents production and maintenance employees at the Company's plant in Atlanta, Georgia.

12. Plaintiffs Lois Sweetman, Linda Burdick, Elsie Nason, Mary Esteile Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney and Donald Penney, are all employees of the company.

13. Plaintiff Lois Sweetman is a citizen of the United States and a resident of Golts, Maryland. She has been employed at the Company's Globe Battery Division Delaware plant for approximately four and one-half years, and is a member of UAW Local 1516.

14. Plaintiff Linda Burdick is a citizen of the United States and a resident of Pound, Vermont. She has been employed at the Company's Globe Battery Division Vermont plant for approximately four and one-half years and is a member of UAW Local 1371.

15. Plaintiff Elsie Nason is a citizen of the United States and a resident of Hoosick Falls, New York. She has been employed at the Company's Globe Battery Division Vermont plant for approximately eleven and one-half years, and is a member of UAW Local 1371.

16. Plaintiff Mary Estelle Schmitt is a citizen of the United States and a resident of Cambridge, New York. She has been employed at the Company's Globe Battery Division Vermont plant for approximately four and one-half years, and is a member of UAW Local 1371.

17. Plaintiff Shirley Jean Mackey is a citizen of the United States and a resident of Atlanta, Georgia. She has been employed at the Company's Globe Battery Division Georgia plant for approximately five and one-half years, and is a member of UAW Local 1791.

18. Plaintiff Mary Craig is a citizen of the United States and a resident of Newark, Delaware. She has

been employed at the Company's Globe Battery Division Delaware plant for approximately fourteen and one-half years and is a member of UAW Local 1516.

19. Anna May Penney is a citizen of the United States and a resident of Middletown, Delaware. She has been employed at the Company's Globe Battery Division Delaware plant for approximately twelve and one-half years and is a member of UAW Local 1516.

20. Donald Penney is a citizen of the United States and a resident of Middletown, Delaware. He has been employed at the Company's Globe Battery Division Delaware plant for approximately one and one-half years, and is a member of UAW Local 1516.

21. Each of the individually named plaintiffs is a member of a Johnson Controls, Inc., Globe Battery Division bargaining unit represented by the UAW, and one of the UAW Local Union.

22. There have been collective bargaining agreements in effect between the UAW and the defendant Company at all times material to the instant suit.

23. The defendant Company, Johnson Controls, Inc., is, and has been at all times relevant herein an employer within the meaning of Title VII of the Civil Rights Act of 1964, ("Title VII") as amended, 42 USC 2000e-(b), (g), and (h). At all times herein relevant, the Company has been and continues to be subject to the provisions of Title VII. It is engaged in an industry affecting commerce and manufactures and distributes batteries in interstate commerce.

24. The Company is incorporated and exists under the laws of the State of Delaware.

25. Defendant's corporate headquarters are located at 5757 North Green Bay Avenue, Milwaukee, Wisconsin 53201.

III.

CLASS ACTION

26. The UAW, its local unions, Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney and Donald Penney, sue individually and representatively on behalf of a class of all employees similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The plaintiffs represent a class of all past, present and future employees of the defendant Company at any of its Globe Battery Division facilities, with two sub-classes, one consisting of all past, present and future female employees and others consisting of all past, present and future male employees, who have been and continue to be or might be adversely affected by the practices complained of herein.

27. This action meets the requirements for maintenance as a class action pursuant to Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedure.

28. The class and sub-classes represented are so numerous that joinder of all members is impracticable.

29. Upon information and belief, no other member of the class has instituted a similar action.

30. The questions of law and fact presented by the plaintiffs as hereafter set forth are common to the class.

31. Defendant maintains a single division-wide "Fetal Protection Policy" which discriminates on its face and as applied on the basis of sex.

32. The claims of the representative plaintiffs are typical of the claims of the class.

33. The representative plaintiffs will fairly and adequately protect the interests of the class.

34. The claims and interests of the plaintiffs do not conflict with the interests of any other members of the class.

35. The prosecution of separate actions by individual members of the class will create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant Company.

36. The Company discriminates on the basis of sex in hiring, wages, hours and terms of employment, through the implementation and continuance of its division-wide "Fetal Protection Policy." Defendant Company has acted or refused to act on grounds generally applicable to the class, or the relevant sub-class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

IV.

FACTS

37. On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which it thereafter announced to its Globe Battery Division plants and to the unions representing workers at its Globe Battery Division plants.

38. The "Fetal Protection Policy" requires the removal from high lead exposure areas of all women capable of reproducing and the implementation of lead exposure reduction procedures. Women are presumed capable of childbearing until they medically prove the contrary.

39. Since August 9, 1982, the Company has begun implementation of its "Fetal Protection Policy" at each of its facilities. The policy remains in force at the Company's facilities continuously to the present time.

40. The "Fetal Protection Policy" constitutes an overt sex based classification which has an adverse impact on

both female and male employees on the basis of gender. On its face and as applied, the Company's "Fetal Protection Policy" constitutes discriminatory treatment and causes discriminatory effects on the basis of sex.

41. In particular, the "Fetal Protection Policy" discriminates on the basis of sex as defined by the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964, Section 701(k), and violates Sections 703(a)(1) and (2) of Title VII.

42. Pursuant to its "Fetal Protection Policy," the Company discriminates against both women and men on the basis of sex. This sex discrimination includes but is not limited to sex discriminatory treatment in:

a. recruitment and hiring;

b. job assignments;

c. wages;

d. promotions within the bargaining unit;

e. transfers within the bargaining unit;

f. seniority;

g. overtime;

h. layoff and recall;

i. demotions;

j. on-the-job training;

k. maternity policies;

l. on-the-job harassment;

m. fringe benefits;

n. health and safety conditions.

43. Until recent years, the Company has discriminated on the basis of sex in hiring. Consequently, the percentage of women workers is under 10% in each of its production and maintenance bargaining units.

44. On information and belief, following the promulgation of the "Fetal Protection Policy" the Company

has stopped hiring "women of childbearing capability" at all of its Globe Battery Division manufacturing facilities.

45. The percentage of female employees at the Company's production facilities has not increased since the promulgation of the "Fetal Protection Policy."

46. Pursuant to the "Fetal Protection Policy," defendant Company discriminates on the basis of sex in making job assignments. Women of childbearing capability are discouraged from bidding under the collectively bargained promotion and transfer system into jobs in leaded areas.

47. If women do bid on lead exposure jobs, they are denied the job and it is awarded to a male, contrary to the seniority system, in violation of the collective bargaining agreement.

48. The defendant Company discriminates against women already holding jobs in leaded areas. They must wear respirators while working, are transferred out of jobs and are kept from returning to their jobs at lower blood lead levels than similarly situated male workers.

49. Because female employees are excluded from many of the jobs at defendant Company's production facilities, pursuant to the "Fetal Protection Policy," they are denied equal opportunity for promotion, overtime, transfer, and on-the-job training. They are also subject to layoff and recall outside the seniority system because they are not allowed to exercise rights to positions in lead exposure areas.

50. The Company has and continues to violate the general duty clause of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654(a)(1), in failing to provide a reproductively safe and healthy working environment for its female workers, rather than removing them from the hazard.

51. The Company's "Fetal Protection Policy" is in non-compliance with the OSHA lead standard, 29 CFR § 1910.1025 *et. seq.*

52. The Company's "Fetal Protection Policy" discriminates against male workers in that it denies them equally clean, safe and free from hazard, terms and conditions of employment compared to women. In particular, fertile males are subjected to greater hazards to their reproductive health than are similarly-situated women. Male employees seeking to take precautionary steps to protect their reproductive capabilities are treated less favorably than similarly-situated women.

53. The Company's "Fetal Protection Policy" discriminates against male workers in terms of placement, assignment, promotion, and/or transfer to low lead exposure jobs because current women employees, under certain circumstances, are given preferential treatment regarding placement in low lead exposure jobs.

54. The Company has and continues to violate the general duty clause of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654(a)(1), in failing to provide a reproductively safe and healthy working environment for its male employees.

55. The Company's "Fetal Protection Policy" is in non-compliance with the OSHA lead standard, 29 C.F.R. § 1910.1025 *et. seq.*

56. Named plaintiff Lois Sweetman was transferred from her position as C.O.S. loader to a job in the Formation Section, pursuant to the "Fetal Protection Policy."

57. If Ms. Sweetman had been a male she would not have been transferred at so low a blood lead level.

58. Since then Ms. Sweetman's blood lead level has decreased further still, but she has not been allowed to returned to her job as a C.O.S. loader.

59. If Ms. Sweetman were a male worker she would have been allowed to return to her job in a leaded area when her blood lead level decreased.

60. Ms. Sweetman filed charges of discrimination with both the Delaware Department of Labor, Anti-Discrimination Section and the EEOC.

61. On January 24, 1984, the Delaware agency issued a determination finding probable cause to believe that the Company discriminated against Ms. Sweetman with respect to her sex.

62. The Company informed named plaintiff Linda Burdick that because of the "Fetal Protection Policy" she, as a fertile female, would not be allowed to work in a "leaded" area.

63. Ms. Burdick has been discouraged by the Company from bidding on jobs in leaded areas.

64. If the Policy was not in effect, Ms. Burdick would have bid on jobs in leaded areas as they became available.

65. Ms. Burdick has been denied job opportunities on the basis of her sex.

66. Named plaintiff Elsie Nason was involuntarily moved from her job of four years as a site terminal welder because of the lead in the area.

67. Even though she is fifty years old and divorced, Ms. Nason is considered "a woman of childbearing capability" by the Company, under its "Fetal Protection Policy."

68. If Ms. Nason were a male she would not have been transferred.

69. Named plaintiff Mary Estelle Schmitt was denied a job in Quality Control, which had just become available, and for which she had placed two advance bids in 1982.

70. Ms. Schmitt was told by the Company that as a fertile female she cannot work in a leaded area.

71. The job Ms. Schmitt sought was given to a male with nearly one and one-half years less seniority.

72. Named plaintiff Shirley Jean Mackey was transferred from her job as a C.O.S. loader to a non-lead area job, that of container punch operator.

73. If Ms. Mackey were a male she would not have been transferred.

V.

INJURIES

74. By its continuous and division-wide implementation of the "Fetal Protection Policy," the Company has discriminated on the basis of sex in wages, terms, conditions and benefits of employment in violation of Sections 703(a)(1) and (2) of Title VII, 42 U.S.C. § 2000e-2(a)(1) and (2), and has inflicted and will continue to inflict irreparable injury upon plaintiffs and the class they represent.

75. As a result of the unlawful discriminatory acts of the Company, all past, present and future female employees have been and continue to be subjected to irreparable injury, including but not limited to the following:

a. They have been deprived of equal job security regarding jobs in leaded areas.

b. They have been denied equal opportunity for advancement and promotion regarding jobs in leaded areas.

c. They have been denied equal access to many higher paying jobs because of being frozen out of jobs in leaded areas.

d. They have been denied job satisfaction and training equal to that of male workers in leaded ares.

e. They are subject to layoff in violation of the protections of the seniority system.

f. They are denied recall rights based on seniority.

g. They are subject to embarrassment and humiliation because their private reproductive functions are made a public issue, without their consent.

h. When permitted to work in leaded areas, female employees must suffer the discomfort of wearing respirators at lower blood lead levels than male workers.

i. When removed from jobs in leaded areas, female employees often lose additional incentive pay.

j. The atmosphere of insecurity and hostility toward women created by the Company, may well cause some to quit, and others to be sterilized to escape the unlawful policy.

k. By removing women rather than cleaning up the workplace, the employer is violating their equal rights to a reproductively safe work environment under the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1).

l. Female employees are harassed and intimidated by the Company's explicit declaration that women workers are not wanted at the Company's production facilities.

76. Female workers also suffer less earnings, including incentive and overtime pay, as well as straight time rates, because of the Company's discriminatory policy.

77. As a result of the unlawful, discriminatory acts of the Company, all past, present and future male employees have been and continue to be subjected to irreparable injury, including but not limited to the following:

a. Male employees are denied equally clean, safe and free from hazard, terms and conditions of employment compared to female employees;

b. Male employees are not given the same preferential placement treatment as female employees removed from jobs in leaded areas pursuant to the "Fetal Protection Policy."

c. Male employees desiring to reproduce are subjected to less favorable treatment than similarly-situated females and they are denied their right to a reproductively safe and healthy workplace under OSHA.

78. All present and future employees have been and continue to be subject to irreparable injury by the Company's refusal to hire women, including but not limited to being deprived of their right to an integrated work environment.

79. The above unlawful employment practices have inflicted, and will continue to inflict injury on named plaintiffs Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney and Donald Penney, including but not limited to the following:

a. Lois Sweetman's loss of her job in a leaded area, has deprived her of opportunity, income and job satisfaction;

b. Linda Burdick was discouraged from bidding on jobs in leaded areas, suffering attendant loss of employment opportunity and income;

c. Elsie Nason was removed from her job in a leaded area, suffering loss of employment opportunity, income and job satisfaction;

d. Mary Estelle Schmitt was denied the job she bid on and was contractually entitled to, suffering loss of employment opportunity, income, job satisfaction and collectively bargained for rights under the seniority system;

e. Shirley Jean Mackey's removal from her job in a leaded area has deprived her of employment opportunity, income and job satisfaction;

f. The Company's creation of an atmosphere of insecurity regarding the continued employment of fertile females so severe that Mary Craig believed the only way she would be guaranteed continued employment at the Company was to be surgically sterilized, caused her to undergo that medical procedure;

g. Anna May Penney has been kept on a respirator at lower blood lead levels than a male, suffering loss of job satisfaction and discomfort;

h. Donald Penney has been required to work in leaded areas at a higher blood lead level than a female would be allowed to work in, causing him a loss of equally clean, safe and free from hazard terms and conditions of employment.

80. By its "Fetal Protection Policy," the defendant Company has inflicted and will continue to inflict irreparable injury on the UAW and its membership in violation of Title VII unless this Court grants relief, including but not limited to the following:

a. By refusing to hire women of childbearing capacity following implementation of the "Fetal Protection Policy," the Company has denied the union and its members the benefits of female membership and association, as well as their right to a sexually integrated workforce;

b. By refusing to promote, and/or transfer women into jobs in leaded areas, the Company has denied the Union and its members the benefit of having female members in numerous positions on the job, and their right to a sexually integrated workplace;

c. The Company, in refusing and failing to end sex discrminatory policies and practices is subjecting the UAW to the future possibility of lawsuits by female employees or applicants for failure to correct said unlawful employment practices, and is subjecting the

union's current membership to the risk of remedies for future discriminatees, which may impair, modify, amend or otherwise adversely affect the collective bargaining agreements and the employees' rights thereunder.

81. The plaintiffs and the class they represent are suffering and will continue to suffer irreparable injury if no relief is granted against defendant Company's unlawful acts and practices as set forth herein.

82. A multiplicity of suits will result if the relief herein requested is not afforded in a class action.

83. The plaintiffs have no plain, adequate remedy at law to redress the wrongs alleged herein, and this suit is the only means of securing relief.

VI.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant the following:

A. That this Court advance this matter on the docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

B. That this Court enter preliminary injunctive relief enjoining the defendant Company, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with it, from engaging in the discriminatory policies and practices complained of above, pursuant to the Company's "Fetal Protection Policy," including but not limited to the following:

1. Enter an order enjoining the Company from failing or refusing to promote or transfer females into jobs in leaded areas;

2. Enter an order enjoining the Company from removing females from jobs in leaded areas at blood lead levels lower than that at which males are removed;

3. Enter an order enjoining the Company from placing women workers on respirators at blood lead levels which are lower than those at which men are placed on respirators;

4. Enter an order compelling the Company to nondiscriminatorily hire, assign, transfer and promote all females, fertile or infertile;

5. Enter an order compelling the Company to nondiscriminatorily apply all terms and conditions of employment, including but not limited to those provided for in the applicable collective bargaining agreements;

6. Enter an order mandating that Lois Sweetman be returned to her job as a C.O.S. loader with full back pay and benefits;

7. Enter an order mandating that Linda Burdick be afforded the opportunity to bid on jobs in leaded areas;

8. Enter an order mandating that Elsie Nason be returned to her job as a site terminal welder with back pay and benefits;

9. Enter an order mandating that Mary Estelle Schmitt be promoted to the next opening in her plant for a Quality Control Auditor, with full back pay, front pay and all benefits;

10. Enter an order mandating that Shirley Jean Mackey be returned to her job as a C.O.S. loader with back pay and benefits.

11. Enter an order mandating damages to Mary Craig for mental distress, emotional pain and suffering and the loss of her reproductive capabilities.

12. Enter an order mandating that Donald Penney be provided the same equally clean, safe and free from hazard terms and conditions of employment as would a fertile female;

13. Enter an order mandating that Anna May Penney be placed on a respirator only at the same blood lead levels as would a male;

14. Enter an order prohibiting company layoffs and/or recalls on the basis of the "Fetal Protection Policy," limiting layoffs and recalls to the contractually-mandated date-of-hire seniority system;

15. Enter an order enjoining the Company from maintaining or continuing the policies and practices of denying, abridging, withholding, conditioning, and limiting or otherwise interfering with the rights of plaintiffs and the classes they represent as provided under Title VII.

C. That this Court grant permanent injunctive relief enjoining the defendant Company, its officers, agents, employees, successors, assigns, and all persons in active concert or participation with it, from engaging in the discriminatory practices complained of above, including but not limited to the following:

1. Enter an order enjoining the Company from failing or refusing to promote or transfer females into jobs in leaded areas;

2. Enter an order enjoining the Company from removing females from jobs in leaded areas at blood lead levels lower than that at which males are removed;

3. Enter an order enjoining the Company from placing women workers on respirators at blood lead levels which are lower than those at which men are placed on respirators;

4. Enter an order compelling the Company to nondiscriminatorily hire, assign, transfer and promote all females, fertile or infertile;

5. Enter an order compelling the Company to non-discriminatorily apply all terms and conditions of employment, including but not limited to those provided for in the applicable collective bargaining agreements;

6. Enter an order mandating that Lois Sweetman be returned to her job as a C.O.S. loader with full back pay and benefits;

7. Enter an order that Linda Burdick be afforded the opportunity to bid on jobs in leaded areas;

8. Enter an order mandating that Elsie Nason be returned to her job as site terminal welder with back pay and benefits;

9. Enter an order mandating that Mary Estelle Schmitt be promoted to the next opening in her plant for a Quality Control Auditor, with full back pay, front pay and all benefits;

10. Enter an order mandating that Shirley Jean Mackey be returned to her job as a C.O.S. loader with back pay and benefits;

11. Enter an order mandating damages for Mary Craig for mental distress, emotional pain and suffering and the loss of her reproductive capabilities;

12. Enter an order mandating that Donald Penney be provided the same equally clean, safe and free from hazard terms and conditions of employment as would a fertile female;

13. Enter an order mandating that Anna May Penney be placed on a respirator only at the same blood lead levels as would a male;

14. Enter an order prohibiting Company layoffs and/or recalls on the basis of the "Fetal Protection Policy," limiting layoffs and recalls to the contractually-mandated date-of-hire seniority system.

15. Enter an order enjoining the Company from maintaining or continuing the policies and practices of denying, abridging, withholding, conditioning, and limiting or otherwise interfering with the rights of plaintiffs and the classes they represent as provided under Title VII.

D. That this Court declare the aforesaid "Fetal Protection Policy" to be unlawful and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e, *et. seq.*

E. That this Court enter a judgment against the defendant Company and in favor of each named plaintiff to make them monetarily whole for lost past, present and future pay and benefits each has suffered or will suffer as a result of the Company's unlawful employment practices.

F. That this Court enter a judgment against the defendant Company requiring defendant to make whole those persons adversely affected by the unlawful practices described herein by providing appropriate monetary relief with interest, in an amount to be proved at trial herein, including but not limited to the differential pay and benefits received by members of the class on their present jobs and the pay and benefits they would have received had they not been unlawfully denied promotions or transfers by the Company because of discrimination, pay lost due to removal from jobs in leaded areas, pay lost due to discriminatory layoffs, lost incentive or overtime pay, and by restoring appropriate seniority and fringe benefit credits to those unlawfully deprived of part or all of their seniority rights.

G. That the Court grant any other affirmative relief which may be necessary to place each of the individually-named plaintiffs and every other member of the class represented in the same position in which they would have been but for the unlawful employment practices of defendant Company, and to eradicate the effects of defendant Company's unlawful employment practices.

H. That the Court award the plaintiffs and the classes represented, costs and attorney fees, to be paid by the Company.

I. That the Court grant such other and further relief as the Court may deem appropriate.

[Signatures Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

ANSWER

NOW COMES Defendant, Johnson Controls, Inc., by its attorneys, Stanley S. Jaspan, Renee L. Johnson and Susan R. Maisa, and as and for its Answer to the Complaint herein, admits, denies and alleges as follows:

1. With respect to Paragraph 1 of the Complaint, admits that Plainitffs are attempting to invoke the jurisdiction of this Court pursuant to certain federal statutes; denies that jurisdiction may be properly invoked in this instance pursuant to those statutes and denies each and every other allegation contained in Paragraph 1 of the Complaint.

2. Denies each and every allegation contained in Paragraph 2 of the Complaint.

3. Admits the allegations contained in Paragraph 3 of the Complaint.

4. With respect to Paragraph 4 of the Complaint, admits that Plaintiffs International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union Nos. 12, 119, 509, 754, 1283, 1371 and 1516 filed a charge of discrimination with the EEOC alleging that Defendant has discriminated on the basis of sex through its fetal protection policy; denies that Defendant has committed any unlawful discrimination and denies each and every other allegation contained in Paragraph 4 of the Complaint.

5. Admits the allegations contained in Paragraph 5 of the Complaint, alleging in this respect that Defendant has committed no acts of unlawful discrimination.

6. Admits the allegations contained in Paragraph 6 of the Complaint.

7. With respect to Paragraph 7 of the Complaint, denies the allegations contained therein at least with respect to some of the named Plaintiffs.

8. With respect to Paragraph 8 of the Complaint, alleges that the proper statutory references are 42 U.S.C. § 2000e(d) and (e); admits the other allegations contained in Paragraph 8 of the Complaint.

9. Admits the allegations contained in Paragraph 9 of the Complaint, alleging in this respect that the Texas facility is located in Garland and not in Dallas.

10. Admits the allegations contained in Paragraph 10 of the Complaint.

11. With respect to Paragraph 11 of the Complaint, denies that UAW Local Union No. 1719 represents any bargaining units of Defendant; alleges that the proper statutory references are 42 U.S.C. § 2000e(d) and (e) and 42 U.S.C. § 2000e(a); alleges that the California facility is located in Fullerton and not in Pamona; alleges on information and belief that the address of Local Union No. 119 is 2922 Hillsdale Lane, Garland, Texas 75042, that the address of Local Union No. 509 is 7931 Seville Avenue, Huntington Park, California 90255, that the address of Local Union No. 1283 is 3421 Chateau Lane, Louisville, Kentucky 40219, and that the address of Local Union No. 1343 is 2414 Mamie, Texarkana, Texas 75501; admits the other allegations contained in Paragraph 11 of the Complaint.

12. With respect to Paragraph 12 of the Complaint, admits that Plaintiffs Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey

and Mary Craig are all employees of Defendant; denies each and every other allegation contained in Paragraph 12 of the Complaint.

13. Admits the allegations contained in Paragraph 13 of the Complaint.

14. With respect to Paragraph 14 of the Complaint, alleges that Plaintiff Linda Burdick is a resident of Bennington, Vermont, has been employed by Defendant since September 1978, and is currently on a medical leave of absence due to pregnancy; admits the other allegations contained in Paragraph 14 of the Complaint.

15. Admits the allegations contained in Paragraph 15 of the Complaint.

16. With respect to Paragraph 16 of the Complaint, alleges that Plaintiff Mary Estelle Schmitt is a resident of Hoosick Falls, New York; admits the other allegations contained in Paragraph 16 of the Complaint.

17. Admits the allegations contained in Paragraph 17 of the Complaint.

18. With respect to Paragraph 18 of the Complaint, alleges that Plaintiff Mary Craig is a resident of Middletown, Delaware; admits the other allegations contained in Paragraph 18 of the Complaint.

19. With respect to Paragraph 19 of the Complaint, admits that Anna May Penney is a citizen of the United States and a resident of Middletown, Delaware; denies knowledge or information sufficient to form a belief as to the truth of the allegation concerning her membership in UAW Local 1516; denies each and every other allegtion contained in Paragraph 19 of the Complaint; alleges that Anna May Penney was employed by Defendant at its Globe Battery Division Delaware plant from July 1971 to March 1984, at which time she voluntarily terminated her employment with Defendant.

20. With respect to Paragraph 20 of the Complaint, admits that Donald Penney is a citizen of the United States and a resident of Middletown, Delaware; denies knowledge or information sufficient to form a belief as to the truth of the allegation concerning his membership in UAW Local 1516; denies each and every other allegation contained in Paragraph 20 of the Complaint; alleges that Donald Penney was employed by Defendant at its Globe Battery Division Delaware plant from September 1981 to March 1984, at which time he voluntarily terminated his employment with Defendant.

21. With respect to Paragraph 21 of the Complaint, denies that Anna May Penney and Donald Penney are currently members of any bargaining unit of Defedant's employees; admits the other allegations contained in Paragraph 21 of the Complaint.

22 Admits the allegations contained in Paragraph 22 of the Complaint.

23. Admits the allegations contained in Paragraph 23 of the Complaint.

24. Denies each and every allegation contained in Paragraph 24 of the Complaint; alleges that Defendant is incorporated and exists under the laws of the State of Wisconsin.

25. With respect to Paragraph 25 of the Complaint, alleges that Defendant's corporate headquarters are located at 5757 North Green Bay Avenue, Glendale, Wisconsin 53209; denies each and every other allegation contained in Paragraph 25 of the Complaint.

26. Denies each and every allegation contained in Paragraph 26 of the Complaint.

27. Denies each and every allegation contained in Paragraph 27 of the Complaint.

28. Denies each and every allegation contained in Paragraph 28 of the Complaint.

29. With respect to Paragraph 29 of the Complaint, admits that no other individual has commenced a court action against Defendant concerning its Globe Battery Division fetal protection policy; denies each and every other allegation contained in Paragraph 29 of the Complaint.

30. Denies each and every allegation contained in Paragraph 30 of the Complaint.

31. With respect to Paragraph 31 of the Complaint, admits that Defendant maintains a fetal protection policy for its Globe Battery Division; denies each and every other allegation contained in Paragraph 31 of the Complaint.

32. Denies each and every allegation contained in Paragraph 32 of the Complaint.

33. Denies each and every allegation contained in Paragraph 33 of the Complaint.

34. Denies each and every allegation contained in Paragraph 34 of the Complaint.

35. Denies each and every allegation contained in Paragraph 35 of the Complaint.

36. Denies each and every allegation contained in Paragraph 36 of the Complaint.

37. Admits the allegations contained in Paragraph 37 of the Complaint.

38. With respect to Paragraph 38 of the Complaint, admits that the fetal protection policy includes lead exposure reduction procedures and defines women of childbearing capability as including all women except those whose inability to bear children is medically documented; denies each and every other allegation contained in Paragraph 38 of the Complaint.

39. With respect to Paragraph 39 of the Complaint, admits that since August 9, 1982, Defendant has imple-

mented and maintained a fetal protection policy at each of its Globe Battery Division facilities; denies each and every other allegation contained in Paragraph 39 of the Complaint.

40. Denies each and every allegation contained in Pargraph 40 of the Complaint.

41. Denies each and every allegation contained in Paragraph 41 of the Complaint.

42. Denies each and every allegation contained in Paragraph 42 and in each subpart of Paragraph 42 of the Complaint.

43. Denies each and every allegation contained in Paragraph 43 of the Complaint.

4. Denies each and every allegation contained in Paragraph 44 of the Complaint.

45. With respect to Paragraph 45 of the Complaint, admits that the percentage of female employees at Defendant's Globe Battery Division production facilities has not increased since the promulgation of the fetal protection policy; denies each and every other allegation contained in Paragraph 45 of the Complaint.

46. With respect to Paragraph 46 of the Complaint, admits that female employees capable of bearing children are discouraged from bidding for positions in high lead exposure jobs; denies each and every other allegation contained in Paragraph 46 of the Complaint.

47. Denies each and every allegation contained in Paragraph 47 of the Complaint.

48. Denies each and every allegation contained in Paragraph 48 of the Complaint.

49. Denies each and every allegation contained in Paragraph 49 of the Complaint.

50. Denies each and every allegation contained in Paragraph 50 of the Complaint.

51. Denies each and every allegation contained in Paragraph 51 of the Complaint.

52. Denies each and every allegation contained in Paragraph 52 of the Complaint.

53. With respect to Paragraph 53 of the Complaint, admits that under certain circumstances individual employees, male and female, may be given preferential treatment regarding placement in low lead exposure jobs pursuant to the terms of the applicable bargaining agreement; denies each and every other allegation contained in Paragraph 53 of the Complaint.

54. Denies each and every allegation contained in Paragraph 54 of the Complaint.

55. Denies each and every allegation contained in Paragraph 55 of the Complaint.

56. Admits the allegations contained in Paragraph 56 of the Complaint.

57. With respect to Paragraph 57 of the Complaint, admits that Ms. Sweetman would not have been transferred at the blood lead level at which she was transferred if she were not capable of bearing children; denies each and every other allegation contained in Paragraph 57 of the Complaint.

58. Admits the allegations contained in Paragraph 58 of the Complaint.

59. With respect to Paragraph 59 of the Complaint, admits that if Ms. Sweetman were not capable of bearing children she might have been allowed to return to a high lead exposure job when her blood lead levels decreased sufficiently; denies each and every other allegation contained in Paragraph 59 of the Complaint.

60. Admits the allegations contained in Paragraph 60 of the Complaint.

61. With respect to Paragraph 61 of the Complaint, admits that on January 24, 1984, the Delaware agency issued a preliminary determination finding reasonable cause to believe that Defendant had discriminated against Ms. Sweetman with respect to her sex; denies that there was any such discrimination and denies each and every other allegation contained in Paragraph 61 of the Complaint.

62. With respect to Paragraph 62 of the Complaint, admits that Plaintiff Linda Burdick was told that the fetal protection policy precluded her, as an individual capable of bearing children, from working in high lead exposure jobs; denies each and every other allegation contained in Paragraph 62 of the Complaint.

63. With respect to Paragraph 63 of the Complaint, admits that Ms. Burdick, as an individual capable of bearing children, was discouraged by Defendant from bidding on jobs with high lead exposure; denies each and every other allegation contained in Paragraph 63 of the Complaint.

64. Denies each and every allegation contained in Paragraph 64 of the Complaint.

65. Denies each and every allegation contained in Paragraph 65 of the Complaint.

66. With respect to Paragraph 66 of the Complaint, admits that Plaintiff Elsie Nason was transferred from her job as a side terminal welder because of her blood lead levels; denies each and every other allegation contained in Paragraph 66 of the Complaint.

67. With respect to Paragraph 67 of the Complaint, admits that Ms. Nason, who has not provided Defendant with medical documentation of her inability to bear children, is considered a woman of childbearing capability

as defined in Defendant's Fetal Protection Policy; admits the other allegation contained in Paragraph 67 of the Complaint.

68. With respect to Paragraph 68 of the Complaint, admits that if Ms. Nason were not capable of bearing children, she might not have been transferred from a high lead exposure job; denies each and every other allegation contained in Paragraph 68 of the Complaint.

69. Admits the allegations contained in Paragraph 69 of the Complaint.

70. With respect to Paragraph 70 of the Complaint, admits that Ms. Schmitt was told that the fetal protection policy precluded her, as an individual capable of bearing children, from working in high lead exposure jobs; denies each and every other allegation contained in Paragraph 70 of the Complaint.

71. With respect to Paragraph 71 of the Complaint, admits that the job Ms. Schmitt sought was given to a less senior male employee; denies each and every other allegation contained in Paragraph 71 of the Complaint.

72. With respect to Paragraph 72 of the Complaint, admits that Plaintiff Shirley Jean Mackey was transferred from her job as a C.O.S. loader to container punch/hot stamp operator; alleges that this transfer was due to a reduction in force and in accordance with her seniority; denies each and every other allegation contained in Paragraph 72 of the Complaint.

73. Denies each and every allegation contained in Paragraph 73 of the Complaint.

74. Denies each and every allegation contained in Paragraph 74 of the Complaint.

75. Denies each and every allegation contained in Paragraph 75 and in each subpart of Paragraph 75 of the Complaint.

76. Denies each and every allegation contained in Paragraph 76 of the Complaint.

77. Denies each and every allegation contained in Paragraph 77 and in each subpart of Paragraph 77 of the Complaint.

78. Denies each and every allegation contained in Paragraph 78 of the Complaint.

79. Denies each and every allegation contained in Paragraph 79 and in each subpart of Paragraph 79 of the Complaint.

80. Denies each and every allegation contained in Paragraph 80 and each subpart of Paragraph 80 of the Complaint.

81. Denies each and every allegation contained in Paragraph 81 of the Complaint.

82. Denies each and every allegation contained in Paragraph 82 of the Complaint.

83. Denies each and every allegation contained in Paragraph 83 of the Complaint.

84. With respect to Part VI of the Complaint, denies that Plaintiffs are entitled to any relief whatsoever.

ADDITIONAL DEFENSES

85. As and for its first separate and alternative defense, alleges that Plaintiffs fail to state a claim upon which relief can be granted.

86. As and for its second separate and alternative defense, alleges that this Court lacks jurisdiction over some of the claims contained in the Complaint because of the failure to file appropriate charges of employment discrimination with the Equal Employment Opportunity Commission within the time prescribed by the statute.

87. As and for its third separate and alternative defense, alleges that being an individual incapable of bearing children is a bona fide occupational qualification for employment in certain high lead exposure jobs in the Defendant's Globe Battery Division, pursuant to Sec. 703 (e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e).

88. As for its fourth separate and alternative defense, alleges that the Defendant's Globe Battery Division fetal protection policy is required by business necessity in order to protect the health and safety of the unborn children of women capable of bearing children from substantial and significant risk of harm from the exposure of such women to lead in certain jobs in the Defendant's Globe Battery Division facilities.

WHEREFORE, Defendant, Johnson Controls, Inc., prays that this action be dismissed in its entirety, that Plaintiffs be denied all relief prayed for in their Complaint, and that Defendant be discharged without delay, be awarded its costs expended herein, including reasonable attorneys' fees, and be granted such other and further relief to which it may be entitled.

Dated this 31st day of May, 1984

[Signatures Omitted in Printing]

[Affidavit of Service Omitted in Printing]

[EXCERPTS OF DEPOSITION OF E.A. ROSS]

(Horwitz Aff., Ex. A)

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* * * *

[67] Q. Now, other than office positions and non-office salaried positions, has the Battery Division hired women for any other positions?

A. Women of child-bearing capability?

Q. Yeah, at its manufacturing facilities since it adopted the Fetal Protection Policy.

A. That's what I was trying to answer before. In the Battery Plants, again, when you say manufacturing?

Q. Yes.

A. The best of my knowledge, the answer would be no, because the policy conditions haven't been met.

* * * *

[ROSS MEMORANDUM]

(Ross Depo., Ex. 8)

JOHNSON CONTROLS

Inter-Office Correspondence

Date August 16, 1982

Subject FETAL PROTECTION POLICY

From E. A. Ross

To GBD Plant Managers
GBD Plant Personnel Managers

The attached Fetal Protection Policy has been approved and is ready for implementation. Several points should be given your consideration:

1. Communication sequence should probably be Plant Staff, Local Union and the bulletin board (M. C. Zilis' policy statement as a permanent posting).
2. In the non-UAW battery plants (and Owosso and Toledo), we should attempt to get the Local Union "on board" through discussion. Pending written clarification of our right to prohibit transfers, the policy states that no fertile women will be hired. In all plants, our position is that we have the right to restrict transfers based upon company right to designate job, management rights clause, qualification aspect of transfer clause, etc.
3. From a "PR" point of view, we are *not* saying that we have discontinued hiring fertile females. We *are* saying that hiring is restricted as specified in the policy. Fertile females can and should be hired at times when policy conditions and restrictions are satisfied.
4. From an "AAP" and "EEO" point of view, paragraph "3" also applies. In addition, AAP's should

be reviewed in light of this policy. It is anticipated that committments regarding plant female hiring will be significantly lower in the future.

5. Please review your entire applicant flow procedures (including review of medical procedures with the Plant Nurse and Doctor). These, of course, vary from plant to plant. Perhaps the most practical procedure regarding applicants would be to ask your plant contact point (receptionist?) to inform female applicants that "we have no openings for women capable of bearing children at this time." Questions regarding fertility, the policy itself, etc. could then be referred to the Plant Nurse or Personnel.
6. Questions regarding sterilization will come from both employees and applicants. It's suggested that they be referred to the Nurse.
7. All of the above will be reviewed in greater detail during the Divisional part of our Personnel Managers' Meeting the week of October 25th. Meanwhile, feel free to direct questions to the undersigned, Mary Byrne or Jean Beaudoin.
8. In Texarkana and Florence, we are operating on the assumption that transfers into prohibited jobs would be minimal and can be prohibited under existing contracts. Accordingly, no limit should be put on the hiring of women of child bearing capabilities.

EAR:ss

cc: J. Beaudoin
M. Byrne
R. Rendl
W. Schmidt
J. Stuppia
R. Tippey
D. Van Horne
M. Zilis

[EEOC CHARGE]

(Horwitz Aff., Ex. A)

MS. LOIS A. SWEETMAN

* * * *

I. On January 10, 1983, I was transferred from my position as a C.O.S. Loader to the Formation Section.

II. I was told by James Fisher, that I was being moved to the Formation Section because my blood lead concentration reading was high and that I was being moved for the fetus protection plan.

III. I believe that I have been discriminated against on the basis of by sex, female, because:

1. Women who are in the child bearing age can not go back to the leaded section when their blood lead concentration is lower.
2. When men's blood lead concentration is low they can be moved back into their same position which is in a leaded area.

* * * *

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. C)

ELSIE NASON, MARY ESTELLE SCHMITT
and LINDA BURDICK

On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which it thereafter announced to its plants and to the unions representing workers at its plants. This policy was implemented without the consent of the unions representing the employees in the relevant bargaining units, and in violation of its collective bargaining agreements.

This policy on its face and as applied, discriminates on the basis of sex. It constitutes an overt sex-based classification, and it also has an adverse impact on the basis of sex. It particularly discriminates on the basis of sex as defined in the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964.

The fetal protection policy discriminates against both men and women on the basis of sex. This includes, but is not limited to, discrimination against women by requiring their removal from certain lead exposure jobs, resulting in discriminatory denial of employee opportunities, including promotion, transfer, hiring and placement on the basis of sex. In providing involuntary reproductive health hazard protection to women but not to men, the policy further discriminates on the basis of sex against men.

This policy violates Section 703(a)(1)(2) of Title VII, 42 U.S.C. Sections 2000e-2(a)(I) and

Specifically, the implementation of this policy at the Bennington, Vermont plant, discriminates against Elsie Nason, Mary Estelle Schmitt and Linda Burdick in the following ways:

In or about February of 1983, Elsie Nason was moved from her job as a site terminal welder because of the lead in the area, and because even though fifty years old and divorced, she is considered a fertile female. If Mrs. Nason were a male she would not have been transferred. Ms. Nason had been at the job of site terminal welder for the previous four years. The job move has meant a loss of both incentive pay and significant job satisfaction.

On or about June, 1983, Mary Estelle Schmitt was denied a job in Quality Control, which had just become available, and for which she had placed two advance bids in 1982. She was refused the job because she is a fertile female. She was told by the employer that she cannot work in a leaded area. The job was given to a male, with close to one and one-half years less seniority.

Linda Burdick has been discriminated against because her opportunity for advancement is far more limited than that of males. She has been informed that because of the existence of the "Fetal Protection Policy" she, as a fertile female, will not be allowed to work in a "leaded" area. She has been discouraged from bidding on jobs in leaded areas because of the existence of the Plan. If the Plan was not in effect, she would have bid on jobs in leaded areas as they became available.

This charge is filed by counsel on behalf of Elsie Nason, Mary Estelle Schmitt and Linda Burdick, as well as all others who may be similarly discriminated against by the implementation of the Globe Battery "Fetal Protection Policy."

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. F)

SHIRLEY JEAN MACKEY

* * * *

On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which it thereafter announced to its plants and to the unions representing workers at its plants. The policy was implemented without the consent of the unions representing the employees in the relevant bargaining units, and in violation of the collective bargaining agreements.

This policy, on its face and as applied, discriminates on the basis of sex. It constitutes an overt sex-based classification, and it also has an adverse impact on the basis of sex. It particularly discriminates on the basis of sex as defined in the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964.

The fetal protection policy discriminates against both men and women on the basis of sex. This includes, but is not limited to, discrimination against women by requiring their removal from certain lead exposure jobs, resulting in discriminatory denial of employment opportunities including promotion, transfer, hiring and placement on the basis of sex. In providing involuntary reproductive health hazard protection to women but not to men, the policy further discriminates on the basis of sex against men.

This policy violates Section 703(a)(1) and (2) of Title VII, 42 U.S.C. Sections 2000e-2(a)(I) and (2).

Specifically, the implementation of this policy at the Atlanta, Georgia plant discriminates against Shirley Jean Mackey by causing her removal from her job in a lead

exposure area because she is a fertile female. In or about April, 1983, Ms. Mackey was transferred from her job as a COS loader to a non-leaded area job, that of container punch operator. If Ms. Mackey were a male, she would not have been transferred.

This charge is filed by Counsel on behalf of Shirley Jean Mackey, as well as others who may be similarly discriminated against by the implementation of the Globe Battery "Fetal Protection Policy."

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. G)

MS. MARY CRAIG

* * * *

On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which thereafter announced to its plants, its employees, and to the unions representing workers at its plants. This policy was implemented without the consent of the unions representing the employees in the relevant bargaining units, and in violation of its collective bargaining agreements.

This policy, on its face and as applied, discriminates on the basis of sex. It constitutes an overt sex-based classification, and it also has an adverse impact on the basis of sex. It particularly discriminates on the basis of sex as defined in the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964.

The fetal protection policy discriminates against both men and women on the basis of sex. This includes, but is not limited to, discrimination against women by requiring their removal from certain lead exposure jobs, resulting in discriminatory denial of employment opportunities, including promotion, transfer, hiring and placement on the basis of sex, providing involuntary reproductive health hazard protection to women but not to men, the policy further discriminates on the basis of sex against men.

This policy violates Section 703(a)(1)(2) of Title VII, 42 U.S.C. Sections 2000e-2(a)(1) and (2).

In particular, the employer's fetal protection policy has discriminated on the basis of sex against charging party Mary Craig. The company's announcement of this policy

threatened her, unlike her fertile male co-workers, with loss of her desirable position working in a lead exposure area. Under the terms of the policy, Ms. Craig could only achieve job security if she were sterilized or otherwise became infertile. Her male co-workers were not required to prove infertility in order to be assured of job retention on these same exposure jobs.

The employer's imposition of infertility upon women but not men as a condition of secure employment discriminated against Ms. Craig, unlawfully coercing her into submitting to sterilization in order to be assured of her job. She elected to be sterilized on June 27, 1983.

This charge is filed on behalf of Ms. Craig and all others who may be similarly discriminated against by the employer because of its "fetal protection policy."

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. H)

MS. ANNA MAY PENNEY

* * * *

On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which it thereafter announced to its plants and to the unions representing workers at its plants. This policy was implemented without the consent of the unions representing the employees in the relevant bargaining units, and in violation of its collective bargaining agreements.

This policy, on its face and as applied, discriminates on the basis of sex. It constitutes an overt sex-based classification, and it also has an adverse impact on the basis of sex. It particularly discriminates on the basis of sex as defined in the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964.

The fetal protection policy discriminates against both men and women on the basis of sex. This includes, but is not limited to, discrimination against women by requiring their removal from certain lead exposure jobs, resulting in discriminatory denial of employment opportunities, including promotion, transfer, hiring and placement on the basis of sex. Providing involuntary reproductive health hazard protection to women but not to men, the policy further discriminates on the basis of sex against men.

This policy violates Section 703(a)(1)(2) of Title VII, 42 U.S.C. Sections 2000e-2(a)(1) and (2).

In particular, as implemented at the Middletown, Delaware plant, the employer's fetal protection policy discriminates on the basis of sex against Anna May Penney

by requiring her, because she is a fertile female, to wear a respirator when her blood lead level is lower than the blood lead level at which a male is required to wear one. Prior to the implementation of the fetal protection policy, the blood lead levels at which female and male workers were placed on and off respirators were the same.

This charge is filed by Counsel on behalf of Anna May Penney as well as all others who may be similarly discriminated against by the implementation of the Globe Battery fetal protection policy.

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. I)

DONALD PENNEY

* * * *

On March 6, 1984, Donald Penney and his wife Anna May Penney, both production workers at the Company's Globe Battery Division, Delaware plant, met with John Frey, the plant Personnel Manager, to discuss their requested Leaves of Absence. Mr. Penney had requested a three month leave of absence for the purpose of lowering his blood lead level to enable him to father a child. At the meeting Donald Penney was harassed and intimidated into quitting by Mr. Frey. The events of this March 6, 1984 meeting constitute a constructive discharge of Mr. Penney in violation of Sections 703(a) and 704(a) of Title VII, 42 U.S.C. § 2000e-2(a) and 3(a).

At the time of the meeting Mr. Penney and his wife, Ms. Penney, each filed an EEOC charge against the Company for discriminating against both men and women on the basis of sex through the Company's implementation of its "Fetal Protection Policy." The charges filed on January 1, 1984 and February 2, 1984 respectively, state, among other things, that the "Fetal Protection Policy" was a violation of Title VII, 42 U.S.C. Sections 2000e-2 (a)(1) and (2). Filing an EEOC discrimination charge is a protected form of opposition to employment discrimination.

Mr. Frey made the pending EEOC charges and potential lawsuit a major issue at the March 6, 1984 meeting. He informed Mr. Penney that he did not know why Mr. Penney would want a leave when Mr. Penney was suing the Company about the "Fetal Protection Policy" and that he, Mr. Frey, would recommend against

granting the leave. Throughout the meeting, Mr. Frey continually harassed and intimidated Mr. Penney and said that if Mr. and Mrs. Penney felt the way they did they should quit.

Mr. Frey's refusal to recommend that Mr. Penney be granted the requested leave, when other requested leaves have been granted, constitutes discrimination on the basis of sex, as well as retaliation for the Penneys' previous filing of EEOC charges. Mr. Frey's harassment and intimidation of Mr. Penney was intended to and had the effect of coercing him into quitting. It therefore constitutes a constructive discharge for the purpose of and having the effect of sex discrimination as well as retaliation for the Penney's previously filing EEOC charges.

The above-described discrimination was in part, if not entirely, in retaliation for the Penney's earlier filing of EEOC charges, as well as constituting sex discrimination in that Mr. Penney's request for a leave for procreative purposes would have been accommodated had he been a woman.

This charge is filed on behalf of Donald Penney by counsel.

* * * *

[EEOC CHARGE]

(Horwitz Aff., Ex. I)

MR. DONALD PENNEY

* * * *

On or after August 9, 1982, the Company propounded a "Fetal Protection Policy," which it thereafter announced to its plants, its employees, and to the unions representing workers at its plants. This policy was implemented without the consent of the unions representing the employees in the relevant bargaining units, and in violation of its collective bargaining agreements.

This policy, on its face and as applied, discriminates on the basis of sex. It constitutes an overt sex-based classification, and it also has an adverse impact on the basis of sex. It particularly discriminates on the basis of sex as defined in the Pregnancy Disability Act of 1978 amendment to Title VII of the Civil Rights Act of 1964.

The fetal protection policy discriminates against both men and women on the basis of sex. This includes, but is not limited to, discrimination against women by requiring their removal from certain lead exposure jobs, resulting in discriminatory denial of employment opportunities, including promotion, transfer, hiring and placement on the basis of sex. In providing involuntary reproductive health hazard protection to women but not to men, the policy further discriminates on the basis of sex against men.

This policy violates Section 703(a)(1)(2) of Title VII, 42 U.S.C. Sections 2000e-2(a)(1) and (2).

In particular, as implemented at the Middletown, Delaware plant, the employer's fetal protection policy discriminates on the basis of sex against Donald Penney in at least two respects. First, it denies him equally clean,

safe and free from hazard, terms and conditions of employment compared to women. Second, because the employer's policy unlawfully discriminates against women by requiring their removal from certain positions under certain circumstances, it also grants them preferential placement treatment. This results in disadvantageous treatment of male workers in placement, assignment, promotion and/or transfer to low lead exposure jobs, and unlawfully discriminates against these men on the basis of sex.

This charge is filed on behalf of Donald Penney, and all others who are similarly discriminated against on the basis of sex by the employer because of its "fetal protection policy."

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

AFFIDAVIT OF EUNICE WILLIAMS

* * * *

3. On November 26 and November 27, 1984, I conducted a telephone survey of the UAW local unions which represent employees of the Battery Division of Johnson Controls, Inc. to determine the total number of production employees at each plant.

4. I determined that Johnson Controls, Inc. employs a total of approximately 2109 production employees at its Battery Division plant. 1834 of those employees are male and 275 are female.

* * * *

[Signatures Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

AFFIDAVIT OF PAUL B. HAMMOND

STATE OF OHIO)
) ss.
COUNTY OF HAMILTON)

Paul B. Hammond, being first duly sworn, on oath, deposes and states as follows:

1. I am a Professor of Environmental Health at the University of Cincinnati. I have held this position since 1972. I received my degree in veterinary medicine in 1949 from Colorado State University and a doctorate in pharmacology from the University of Minnesota in 1955. Attached hereto and incorporated by reference as Exhibit A is my curriculum vitae which lists, among other things, my education and professional background, professional activities and memberships, as well as a bibliography of my professional publications.

2. As a professor at the University of Cincinnati my responsibilities include both teaching and research. In the teaching area, I am currently the Chairman of the Education Group Steering Committee, Department of Environmental Health. As Chairman I oversee the management and direction of several environmental health graduate programs. My current research responsibilities are in the area of the study of adverse effects of lead on children. In the past, I have done research into various aspects of lead toxicity. During my entire tenure at the

University of Cincinnati, I have been involved in the study of lead toxicity.

3. I am the director of a study that is currently being conducted in Cincinnati on the health effects of lead exposure on children. This study analyzes the subsequent mental development of children who have been exposed to lead both in utero and postnatally. The initial results of this ongoing study, which were released in the last year or so, establish that exposure of the fetus to maternal blood lead levels in excess of 12 micrograms per deciliter of whole blood creates a significant risk of low birth weight and a clear decrement in the subsequent mental development of the infant.

4. A similar study of the health effect caused by exposure of the fetus to lead is being conducted in Boston. The most recently published results of the Boston study, which were released in the last year or so, conclude that there is a clear decrement in the mental development of the infant at ages six months and twelve months when the mother has blood lead levels in excess of 10 micrograms during pregnancy. In both the Cincinnati and Boston studies, it was determined that the decreased mental development in the infants was caused by fetal exposure to lead, not postnatal exposure.

5. Based on these very recent studies, it is my opinion that it is medically unacceptable, from the point of view of the health of the fetus, for women to be exposed to lead which can result in blood lead levels in excess of 12 micrograms during pregnancy.

6. There is no clear evidence that exposure of the adult female to lead which causes blood levels of up to 50 micrograms will have any adverse effect on the performance of the female's reproductive organs.

7. I am not aware of any human studies which conclude that blood lead levels of up to, and even exceeding, 50 micrograms in the adult male will cause any demonstrable effect on the development of the fetus. Studies of the effect on the offspring of lead exposed male rats cannot be readily extrapolated to the human male, particularly as to the dose necessary to cause reproductive effects.

8. In 1975, Ioana Lancranjan published a study of the semen characteristics of men who were exposed to lead. The Lancranjan study concludes that at some level of lead exposure there is an effect on sperm morphology (shape). However, no conclusions can be reached from this study as to whether exposure of the adult male to lead will have any effect on the fetus. First, other studies have concluded that semen analysis is a very uncertain measure of reproductive function. Lancranjan admits in the study that it was merely a study of semen characteristics and was not to be taken as an indication of reproductive function.

Further, the measurement of the levels of lead in the blood of the men used in the study is highly suspect. There are basically three measures of lead absorption: lead in the blood, the Delta Amino Levulinic Acid (ALA) in the urine and lead in the urine. Lead in the urine and ALA in the urine have been correlated to blood lead levels. However, in the Lancranjan study, the reported blood lead levels did not correspond to the amount of lead and ALA that was found in the urine. Rather, the blood lead levels were too low for the level of the other two measurements of lead exposure. For example, for the group which reported a blood lead level of 75 micrograms per decaliter, I would have predicted the ALA to be only 19.2, instead of the 56.5 that was reported in the study. Conversely, if the 56.5 ALA measurement is correct, then I would predict that the blood lead levels would have been greater than 90 micrograms, rather than the 75 micrograms reported. Similarly, Lancranjan reports a urine lead of 385 for the 75 microgram blood lead group; however, based on a 385 urine lead, I would have predicted

a blood lead level of greater than 130 micrograms. The lead urine and the ALA reported for the other groups were also too high for the blood leads reported. It is my opinion that for some reason Lancranjan underestimated the true blood leads of the male workers in her study and, therefore, I believe no conclusion can be drawn from this study as to the blood lead levels at which there is an effect on the shape of the sperm.

9. This Affidavit is made and submitted in support of the Motion for Summary Judgment of Defendant Johnson Controls, Inc., in the above-entitled action.

Dated this 12th day of August, 1986.

[Signatures Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

AFFIDAVIT OF JEAN BEAUDOIN

STATE OF MINNESOTA)
) ss.
COUNTY OF ST. LOUIS)

JEAN BEAUDOIN, being first duly sworn, on oath, deposes and states as follows:

1. I am the Manager of Health, Safety and Environmental Control for the Battery Division of Johnson Controls, Inc. ("the Company"). I have held this position since September 1978. I have been employed by the Company or its predecessor, Globe-Union, since 1972.

2. There are 17 plants in the Battery Division of the Company, 14 of which manufacture batteries. These plants produce a variety of automotive and specialty batteries. Lead is the principal active material used in the batteries. It is the principal ingredient of the paste which forms the plates of the batteries. Lead also forms the structure for the plates and all the conductive elements in the battery for transmitting current.

3. Plaintiffs, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its respective locals are the collective bargaining representatives of the production employees at nine of the Battery Division plants. These nine plants are located in Fullerton, California; Garland, Texas; Louis-

ville, Kentucky; Middletown, Delaware; Owosso, Michigan; Bennington, Vermont; Atlanta, Georgia; Texarkana, Arkansas; and Holland, Ohio.

4. Attached hereto and incorporated by reference as Exhibit A is the Fetal Protection Policy that was implemented in 1982 and 1983 at all Battery Division facilities. It remains in effect today at all locations.

5. Attached hereto and incorporated by reference as Exhibit B is a true and exact copy of the transcript of selected portions of the testimony I gave on July 15 and July 16, 1985, in a proceeding conducted before the California Department of Fair Employment and Housing in connection with the implementation of the Fetal Protection Policy at the Battery Division plant located in Fullerton, California.

6. As discussed in my attached testimony (Exhibit B) at pages 118 to 121, the Company has instituted environmental engineering controls to reduce lead exposure at all its Battery Division plants. Since 1978 the Company has spent approximately fifteen million dollars on environmental engineering controls at its Battery Division plants, the vast majority of which are designed to reduce employee lead exposure.

7. Attached hereto and incorporated by reference as Exhibit C is a copy of the lead hygiene program currently in effect at all Battery Division plants. This is the Division's composite program for controlling lead exposure and lead absorption of employees. It identifies the various lead exposure reduction and monitoring programs in effect in the Battery Division. The provisions contained in Exhibit C are all currently in effect, with the exception that the goal of maintaining employee blood lead concentrations below 60 micrograms per 100 milliliters of blood was lowered to 50 micrograms and then to 40 micrograms, the current goal.

8. Attached hereto and incorporated by reference as Exhibit D is a copy of the biological monitoring and follow-up program currently in effect at all Battery Division plants for employees whose job duties expose them to lead.

9. Attached hereto and incorporated by reference as Exhibit E is a copy of the respirator program currently in effect at all Battery Division plants.

10. Attached hereto and incorporated by reference as Exhibit F is a copy of the medical surveillance program currently in effect at all Battery Division plants.

11. Attached hereto and incorporated by reference as Exhibit G is a copy of the program for periodic occupational evaluation for lead exposure currently in effect at all Battery Division plants.

12. Attached hereto and incorporated by reference as Exhibit H is a copy of the wash up and clothes changing program currently in effect at all Battery Division plants.

13. Attached hereto and incorporated by reference as Exhibit I is a copy of the program for work clothing and footwear currently in effect at all Battery Division plants.

14. The lead exposure reduction programs that are attached hereto as Exhibits C through I are described in my attached testimony (Exhibit B) at pages 125 to 133.

15. Attached hereto and incorporated by reference as Exhibit J is a copy of the policy guidelines for employment in lead exposure of women capable of bearing children that was in effect in the Battery Division from 1977 until the implementation of the Fetal Protection Policy in 1982 and 1983.

16. Attached hereto and incorporated by reference as Exhibit K is a chart which lists some of the pregnancies that occurred at the Battery Division plants during the

last 4 years that the voluntary fetal protection program (Exhibit J) was in effect in the Battery Division. This chart is described as Exhibit I in my attached testimony (Exhibit B) at pages 153 to 154.

17. The Company considered alternative methods to protect the health of the fetus from exposure to lead prior to adopting the Fetal Protection Policy. These alternatives were rejected because they did not adequately protect the health of the unborn children of the Company's workers. For example, as discussed above, the Company adopted an educational and counseling program (Exhibit J) for those females capable of bearing children, urging them to avoid those work areas where their blood lead might exceed 30 micrograms. This voluntary program was inadequate because, as demonstrated in attached Exhibit K, significant numbers of women became pregnant while having blood levels in excess of 30 micrograms. Further, the Company has attempted to develop an alternative to lead acid batteries in order to totally eliminate ~~lead~~ exposure; however, these attempts have been completely unsuccessful to date. We have continud to study, develop, and implement engineering controls to reduce the lead exposure and blood lead levels of all employees. However, there are not presently available engineering controls that will reduce lead exposure in the Battery Division plants to a level which will assure that all employees will have blood lead levels below 30 micrograms.

18. Attached hereto and incorporated by reference as Exhibit L is a pie chart which shows the profile of blood lead distributions in the Battery Division plants in April 1982 as compared to April 1985.

19. Attached hereto and incorporated by reference as Exhibit M is a tabular chart of the blood lead distributions in the Battery Division plants at the end of April for the years 1982, 1983, 1984 and 1985.

21. This Affidavit is based upon my own personal knowledge and my review of Company records and is submitted in support of the Motion for Summary Judgment of Defendant Johnson Controls, Inc., in the above-entitled action.

Dated this 12th day of August, 1986.

[Signatures Omitted in Printing]

[FETAL PROTECTION POLICY]

(Beaudoin Aff., Ex. A)

JOHNSON CONTROLS

STANDARD PROCEDURE

Division BATTERY

Section HSECD

Date Effective 11-01-82

Date Revised 07-21-83

Bulletin No. 3-954-01

Endorsed By VP MFG., Dir. Personnel

Distribution 3X-39 & SPECIAL

Subject FETAL PROTECTION PROGRAM
IMPLEMENTATION PROCEDURE

I. *Scope*

A. This standard procedure establishes the procedure for implementing the Fetal Protection Policy (See Exhibit A in the Branch Plants and at Glendale. It is applicable to women of childbearing capability.

B. These practices do not apply to women who have medical confirmation of their inability to bear children, and is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action.

II. *STANDARD PRACTICES*

A. Definitions

The following terms are defined for the purpose of this document:

1. *Women of childbearing capability*—All women except those whose inability to bear children is medically documented.

2. *Basic Action Plan*—Implementation of full shift respirator wear requirement and, where feasible, end of shift showering.

3. *"Acceptable" work station*—A work station where the blood lead readings of the incumbents over the past year are < 30 ug% and air-lead ratings are < 30 ug/m^3. Note however, that an incumbent employee covered by this policy need not be transferred if she maintains a blood-lead reading < 30 ug% in an air exposure ≥ 30 ug/m^3.

4. *Medical Removal Protection (MRP) Benefits*—refer to SPB 3-953-04, V,K,l. for details. MRP benefits will continue until such time as the employee:

   a. no longer has childbearing capability and fails to take advantage of a bid opportunity for a job for which she has sufficient seniority and is otherwise qualified, or

   b. fails to take advantage of a bid opportunity for an "acceptable" job in the same or higher classification for which she has has sufficient seniority and is otherwise qualified.

(Note: The 18 month limitation does not apply to employees transferred under this procedure.)

All removals from lead exposure under this program are considered to be permanent, and not temporary moves.

B. References

SPB 1-950-20 Medical Surveillance Program
SPB 3-950-21 Pre-Employment Examinations
SPB 3-953-04 Biological Monitoring Program
SPB 3-953-11 Respirator Program

C. Responsibilities

1. The Plant Manager shall be responsible for the implementation of this procedure through the Personnel Manager.

2. The Manager of Personnel Administration shall be responsible for review of personnel procedures and forms and coordination of these practices with EEOC/AAP policies.

3. The Manager of Health, Safety & Environmental Control shall be responsible for establishment and review of this procedure and for auditing compliance thereto.

D. New Hires

Women of childbearing capability will only be hired:

REVISED

1. In jobs where, within the past year, no blood-lead sample result has been ≥ 30 ug% and no air-lead sample result has been ≥ 30 ug/m^3.

2. In jobs from which transfers into jobs described in "1" can be prohibited.

E. Existing Employees

REVISED

An existing employee capable of bearing children shall be placed only in a job where, within the past year, no blood-lead result of any of the incumbents (transferees excluded) has been ≥ 30 ug% and no incumbent's air-lead exposure has been ≥ 30 ug/m^3, except that an incumbent employee covered by this policy need not be transferred if she maintains a blood-lead reading < 30 ug% in an air exposure ≥ 30 ug/m^3.

F. Biological Surveillance Program

1. All women of childbearing capability shall be counselled as to the effects of lead and the importance of personal hygiene and good work practices at the time each blood-lead sample is executed.

2. Biological monitoring frequency

Blood lead < 20 ug%—sample every 3 months
Blood lead 20-29 ug%—sample every 2 months with ZPP in the interval between (battery plants only)

Blood lead ≥ 30%—sample monthly

G. Placement Practices

1. Individual with blood leads ≥ 40 ug% (confirmed)

   a. Implement basic action plan.

   b. Transfer as soon as possible to an "acceptable" work station. Implement Medical Removal Protection benefits.

2. Individual with blood leads 35-39 ug%

   a. Basic action plan.

b. After two readings in this range, encourage voluntary transfer. Restrict exposure to 40 hours/week in air-lead levels $\geq$ 30 ug/m^3.

c. After *four* readings in this range transfer as in G.1.b. above.

3. Individual with blood-leads 30-34 ug%

a. Basic action plan.

b. After *three* readings in this range, encourage voluntary transfer. Institute overtime restriction as in G.2.b. above.

Give priority to transfer to an acceptable opening in the same job class.

c. After *six* readings in this range, transfer as in G.1.b above.

NOTE: Actions at steps G.2 and G.3 are triggered by the *total* number of consecutive readings in the 30-39 ug% range.

4. If an employee's blood-lead rises to $\geq$ 30 ug% institute steps as outlined in G.1, 2, and 3 above, depending on blood-lead level.

H. Employee Training

Any employee covered by this procedure, whose blood-lead level is $\geq$ 15 ug%, shall participate in an annual lead education program with emphasis on health effects of lead absorption.

Special Distribution

Plant Occupational Health Nurses

Plant Physicians

EXHIBIT A

Johnson Controls, Inc.
5757 N. Green Bay Avenue
Post Office Box 591
Milwaukee, WI 53201
Tel. 414/228 1200

Milton C. Zilis
Vice President & General Manager

Globe Battery Division

August 9, 1982

FETAL PROTECTION POLICY

We have over the years developed policies to protect the health of our employees whenever the nature of their duties may expose them to a health hazard and to prevent members of their families from being exposed to a health hazard because of their employment with Globe Battery Division.

Medical research has shown that a woman's exposure to lead can cause ill effects on the health of her unborn child because the lead absorbed in the mother's blood as the result of this exposure can cross the placenta and mix with the child's blood. This has been acknowledged by the Occupational Safety and Health Administration.

Medical research also shows that a risk to the unborn child's health is present at a much lower blood-lead level than an adult. The ill effects to the unborn child can occur during the early stages of pregnancy, before the mother is aware that she is pregnant, and can continue throughout the pregnancy.

Because of this, it is the Division's policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or

which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.

This policy is intended to reduce or eliminate the possible unhealthy effects of lead on the unborn children of pregnant employees and applicants. It does not apply to those women who have medical confirmation that they cannot bear children. However, the policy is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action.

/s/ M. C. Zilis
M. C. ZILIS

[EXCERPTS OF BEAUDOIN TESTIMONY]

(Beaudoin Aff., Ex. B)

* * * *

[118] Q How does the company protect against excessive exposure of employees to lead?

A We have a comprehensive program in that regard. Foremost, of course, is employee education, training, counseling. We rely very heavily on engineering controls and have since long before I joined the company. We utilize work practices, programs with the employees, housekeeping programs, respiratory protection, work clothing and equipment and shoes, and an ancillary function of this is to keep all the lead that an employee may contact in the plant in the plant, not to allow it to go home.

These programs are, say, monitored, if you will, through our air sampling program which tends to document the employees exposures, the individual exposures that an employee would experience during a normal working day. Then this is all buttressed by our medical surveillance programs and our biological monitoring program.

* * * *

[122] Q What do you mean by personal hygiene practices?

[123] A Well, lead can be inhaled in the form of dust or fume. It can also be ingested through transference by contact. And employees can get lead on their hands, they can get it under their finger nails. They can easily transfer this to their face through normal habits that are perfectly innocuous in every day life, brushing perspiration of the brow, scratching an itchy noise, (sic) stifling a cough or a yawn, blowing one's nose. These are all things that must be done with care and it is important that people do this and it's a behavioral practice that one has to learn.

Q You mentioned air sampling, what does air sampling do; what does it measure?

A All right. Air sampling is done with a personal sampling pump that the individual wears. The air is drawn into the pump through a filtered cassette that's positioned on the shoulder or lapel of the employee and, as such, it's drawing in air that's in the approximate breathing zone of the person. Sampling for monitoring of exposures is normally done for full shifts and this would include whatever the employee's exposed to in a regular job, the clean up, if the employee is involved in doing special duties that day because perhaps the line on which he's normally working or the operation he's normally working is down for some reason, you monitor that because that's what that employee's exposure is.

Q What do you measure, what are you measuring in taking the air sample?

A You're collecting lead on a filter, you're drawing, in essence, a known amount of air through that filter so you're [124] collecting a known amount of lead from a known amount of air. So you end up with a calculatable concentration of lead in air and you know the amount of air that you're drawing through the pump because you calibrate the pump at the start of the shift and again at the end of the shift.

Q And when reference is made to air leads, is that what you get as a result of the sampling?

A When you talk about the air leads, you're talking about the lead in the air, concentrations that are measured in the process.

Q Will two employees exposed to the same air leads have the same blood leads or same amount of absorption of the lead?

A Not necessarily.

Q Why is that?

A Well, I think no two of us are precisely the same biologically. Secondly, there are two components, two avenues or two pathways for moving lead from the ambient into the body: one is inhalation and the other is ingestion or personal hygiene and contact.

So in the early days when air lead levels were very very high, airborne exposure was the overwhelming route of lead that was entering the body. As exposures have been controlled increasingly more tightly as they are in today's environment in a manufacturing plant, in our plants at least, then the components that can enter the body through ingestion, through lack of less than good personal hygiene can become very significant.

[125] And so it's impossible to precisely correlate air leads to blood leads. Certainly, as air leads increase, blood leads will rise, but you cannot correlate it precisely. A further complicator would be respirators.

If you use respirators, you are in effect screening out a great deal of the airborne contaminant that could be inhaled.

Q Would two employees who work in the same work station have the same air leads necessarily?

A No. Again, you're dealing with work practices and the effect of individual work practices will be to give rise to variability. I think workers can be consistent, but if you were to sample the same individual day after day and he's involved in the job where he's handling product, you will see that the exposure is going to have some variability from day-to-day and much more so if you go from employee to employee.

Q I ask that you look at what I believe has already been introduced as Department Exhibit 7. Can you identify that document, please?

A It is Johnson Controls battery division standard procedure bulletin entitled "Biological Monitoring Program for Battery Division Employees".

Q And generally what does it provide?

A It establishes the program for biological monitoring and follow-up for employees who have lead exposure.

Q What is biological monitoring; what do you mean by that phrase?

A As we—as we're using it here, biological [126] monitoring would refer to blood samples which are ana-

lyzed for blood lead content, lead content, I should say, which is reported as blood leads, also analyzed for hemoglobin or analyzed either for zinc protoporphyrin or free eryrthrocytes, F.E.P. It may have been referred to earlier as F.P.P. I'm not certain.

Q What are the purposes of these various biological monitoring tests?

A The blood lead test, blood lead level basically is a measure of the amount of lead that is circulating in an individual's blood stream. The other tests are more nearly measures of the effect lead is having on the body.

Q What determines how often an individual is tested?

A Our biological monitoring frequency is determined by blood lead levels, or Z.P.P. levels, the particular area worked in, whether the employee is a new employee in lead exposure or not, whether the employee is a woman who is capable of bearing children. There are a great many factors that will influence that frequency.

Q Who decides or on what conditions is an individual removed or restricted in placement because of lead exposure?

A There are really two mechanisms by which that can happen. Number one, the plant physician in reviewing the monitoring results of the employee, from the employee, both air leads and the biologicals and in perhaps in talking with the employee and examining the employee, may reach a conclusion that that employee should be removed from exposure. And it's a medical determination. [127] The other is via the numerical criteria in our policy which are blood lead criteria which would be either a 60 micrograms percent blood lead reconfirmed or running six-month average of blood leads in excess of 50 or at or above 50.

* * * * *

[128] Q I'll show you what's been marked as Respondent's Exhibit A and ask you to identify that document?

A This is labeled a Globe Union, Inc. standard procedure bulletin. It is 1-957-03. It's entitled "Lead Hygiene Program" and this is basically an umbrella bulletin, if you will, that covers the lead exposure control programs.

There's several programs that we have in place; air sampling, respirators, wash up and clothes changing, work clothing, housekeeping, training, engineering controls. It's meant to be basically an overall bulletin that identifies these different programs.

Q I notice the date last revised is June 15, '79; is it still in effect?

[129] A Yes, it is.

Q With respect to the Policy A, is there any change there?

A. That's a good point. The Item A-3, this bulletin says that it is our policy to maintain our employees blood lead concentration between 60 micrograms percent and that was our policy at that time which was at the very outset or approximately at the time the blood standard was issued.

Our policy today is to control below 40 and beyond that, ultimately to get as low as we possibly can.

* * * *

[131] Q Can you identify what's been marked as Respondent's Exhibit C?

A This is a Globe Union standard procedure bulletin number 1-950-22. It's entitled "Periodic Occupational Medical [132] Evaluation".

Q And what is this about?

A It describes and governs the periodic examinations and evaluations that a plant physician would make of lead exposed employees.

Q What is its purpose?

A Its purpose is to—it's part of our overall employee protection. It's intended and this is the step where you would be examining the employee to ascertain that there is no impairment, no impairment of health due to lead or that if there is, to determine what it might be and the extent to which it may exist and, if necessary, to determine what corrective action should be taken.

* * * *

[140] Q Prior to any OSHA standards in that regard, did the company pursuant to these policies, restrict placement of employees and take other such action?

A The company had comprehensive lead exposure control programs and medical surveillance programs and biological monitoring programs in effect well in advance of the lead standard.

In terms of engineering controls, there were very [141] extensive ventilation controls in place when I joined the company in 1972. And there's been a great deal of refinement and augmenting that has taken place since, but that effort goes back well beyond me.

The biological monitoring program and medical surveillance did contain provisions relating to lead transfers. We had our own transfer triggers which were in effect prior to the lead standard and when the lead standard first came into effect, we had triggers which were lower than the lead standard.

Basically, the programs were more protective than what was required by the regulation. And we did have both the dual mechanism of the blood lead trigger as well as physician's medical judgment.

Q What are medical removal protection benefits?

A Medical removal protection benefits are basically the payment—if an employee is removed from a job which entails lead exposure and the person is removed either because of a physician's medical judgment or because the blood lead trigger is reached, the employee is compensated at the average earnings of the job he was removed from, if necessary.

And by way of explanation, a great many of our production jobs are incentive jobs so that as the productivity of the individual or of the group of which he is a member increases, so do the earnings. When an individual is transferred away from a job, of course, if it's a non-incentive job, a straight-time rate, fine. If the job to which he goes has the same rate or higher, there are no benefits paid. If the rate is lower, then the individual's

right is maintained at the [142] rate from which the person was removed. With an incentive job because the earnings day-to-day can be different depending on productivity, we compute an average straight time hourly earnings of while the individual was in the job and that becomes the basis against or the benchmark against which the earnings after the transfer are compared. If the earnings after the transfer are greater, no benefits are paid. If the earnings are less, then the individual is compensated up to that level.

Q Did the company provide for medical removal protection benefits prior to the OSHA standard making any mention of them?

A Yes.

* * * *

[143] Q Do any of the company's current policies exceed the OSHA requirements?

A Yes.

Q Which policies as examples?

A As examples, number one, our biological monitoring policy monitors a greater frequency than that required by the lead standard.

Number two, we prescribe follow-up corrective actions whenever we see certain indications. That is not contained in the lead standard. We have actually implemented engineering controls in instances where air leads themselves would not have required it, but where we felt there was a significant risk to employees.

We have, let's see, our medical surveillance program has aspects of it which are more comprehensive than what is required by the standard.

I believe our training programs go beyond the letter of the regulation. We provide work clothing to people to [144] whom we are not required to provide it under the lead standard. We provide greater change frequency than is required by the standard. We provide and require showering and hand washing of individuals where it is not required by the standard.

If I thought further, there may be others as well.

* * * *

[151] Q Mr. Beaudoin, will you look at Department's Exhibit 5, please. Can you identify that document?

A It is a Johnson Control Standard Battery Division Standard Procedure Bulletin Number 3-954-01 entitled "Fetal Protection Program Implementation Procedure".

Q Is that policy currently in effect?

A Yes, it is.

Q How did that policy come about?

A We have over time been monitoring medical literature as relates to lead and this includes fetal and reproductive effects. Our medical consultant and some of our plant physicians have been recommending to us that we implement a policy in that the risk to the fetus who might be present in the work place as carried by the mother was too great a risk medically.

And we had had a voluntary policy or program in effect and the results of that program indicated that we were seeing, number one, a high number of women who were capable of bearing children with high blood leads and, even more to the point, we were seeing a substantial number of pregnancies where the blood leads of the mother were well in excess of 30. Based upon that, we felt it was necessary to take this type of an action.

* * * *

[152] A This is the guideline defining the voluntary program that was in effect.

Q What was the date of the guidelines?

A June 9th, 1977.

Q What was the purpose of those guidelines?

A The purpose of the guidelines was to reduce the risk to children our women employees would bear by a thorough effort of counseling, educating them to the risks that they were undertaking by working in lead exposure with the hope that as they came to understand and recognize what the magnitude of the risk was, that they would remove themselves from that exposure.

And as a means of trying to emphasize the gravity, the importance have this point, as we had these discussions with them, as our medical people had these discussions, we asked them to sign the statement that they acknowledged they understood these risks and we tried to do this in a high profile manner with the employee as a means of emphasizing the gravity of the situation.

* * * *

[153] Q Why did the company cease using this voluntary policy on fetal protection?

A Well, as I indicated earlier, we were seeing significant numbers of women who were fertile having high blood leads and even more serious than that, they became pregnant with these high blood leads.

* * * *

[155] Q How does this policy work; what is the purpose in terms of specifically?

A The policy basically determines or sets up the mechanism for determining whether an employee or an applicant is capable of bearing children and then takes steps—takes a step with the employees of assuring that they are in positions where their blood leads and the air leads do not exceed 30 micrograms per cubic meter of air, especially the blood leads, and provides the programs that are necessary to assure this occurs.

Q Why do you want that to occur?

A In order to be able to protect any fetus the woman might conceive and carry. The fetus' exposure is from the mother's—the lead in the mother's body, specifically, and most actively the lead in the blood and the mother's blood lead is not strictly a function of her current exposure, but also can be a function of her previous exposure.

[156] Q What happened under this policy to women who were in jobs that became unacceptable?

A As the policy was implemented to minimize the impact it would have and the disruptive impact it would

have on our employees and where employees were working in positions where they had successfully controlled their own blood leads, in other words, they had the mix of, proper mix of personal hygiene practices and work practices that would allow them and they had demonstrated this capability to control their blood leads below 30 consistently, we allowed them to stay in this position.

Also, that's a bid of a phase-in period there where if an individual had blood leads that were slightly above 30, she had the opportunity and we provided her with a variety of assistance, methods of assistance to help her to get her blood lead down below 30 within a specified period of time to stay on-the-job.

Once that occurred, as long as blood leads could be maintained within the guidelines of the policy, they could stay there.

Q What about the woman whose blood leads remained above 30?

A Women whose blood leads remained above 30 were transferred according to the policy into jobs that would be defined as acceptable positions; that is jobs for which there were no air leads or blood leads indigenous to the job above 30 in the past year. And by indigenous to the job, I would mean the lead absorption or the exposure results from that particular job.

[157] So you would, if someone transferred into one of those jobs from another job in the plant and had a high blood lead as they made the move, we would exclude that from the consideration because that high blood lead was not developed on that job. Correspondingly, although the situation has not yet arisen to my knowledge, if we had knowledge of an individual who happened to have a hobby, perhaps working with stained glass, perhaps heavily involved in target shooting at rifle ranges or pistol ranges, perhaps moonlighting as a plumber somewhere where they could get lead exposure other than in our employ, that's something we would have to consider too as to whether that particular—those blood lead readings would be a disqualifier for someone else in that position.

And the same thing would apply to an air leads. If an employee who normally works on that job happened to work on another job on that given day and get air sampled on that day, the position we're considering would not be penalized by the air leads incurred there.

Q For the woman who is transferred to a lower paying job, what happened to her wages?

A Any woman transferred because of this policy would receive medical removal protection benefits.

Q What does that mean?

A As we defined them yesterday, that would be compensation to assure that her earnings would not be diminished by that move.

Q Under the policy of the medical removal protection benefits, are they limited to the 18 months provided for in the [158] OSHA standard?

A No.

Q What time period does it follow?

A These benefits would apply until any one of a couple of things could happen. Number one, until the woman became infertile and was no longer covered by the policy and also had the opportunity to bid onto another job that would be compensating her at a level equal to or higher than that benchmark.

Secondly, it could occur that a woman who while covered by the policy would be able to successfully bid onto another acceptable job that would have a rate of pay that would be equal to or greater than the benchmark of the M.R.P. benefits.

Q You referred to women on the job being allowed to stay there if their blood leads were below 30 even though the job was unacceptable. Were other women covered by the policy, those women capable of bearing children permitted to first enter those jobs?

A Where the air leads were above—

Q The blood lead of other individuals were above?
A No.
Q Why not?
A Well, several things: Number one, as we discussed earlier, in a great many of our jobs the individual work practices of the employee in handling the product which is the dust producing contaminant are a key factor in the overall exposure that they receive. And this is, therefore, going to [159] vary from individual to individual.

Moreover, we see that when an employee, either a new employee is put into a job or an employee transfers into a new job, that is usually the time of highest—that initial period is usually the time of highest exposure and very often the highest blood leads because their exposure goes up until they become familiar with and master the individual work practices that pertain to that job. And that higher exposure usually translates into higher blood leads as well.

* * * *

[163] Q Why doesn't the company allow the new employees to be hired into acceptable jobs or current employees to transfer in until their blood leads rise to 30 micrograms?

A Well, in a sense that's a form of human experimentation. You're taking a risk that, if you did that, you'd be gambling that the woman might not become pregnant and if she did, there wouldn't be enough lead absorption in the mother to create a problem.

It's unacceptable because, first of all, you can't monitor blood leads daily or even weekly. It's an invasive technique of sampling in a vein. It's not good medical practice to do that any more often than is absolutely necessary and trying to do it on a semi-continuous basis is unsound. And it has the potential to seriously damage the woman's veins.

Secondly, as we mentioned earlier, because of work practices, the potential for the greatest exposure is right

at the outset while the employee is learning the proper work practices. So you'd be allowing the individual to work at the time of greatest risk. And if the individual remained in that position for a while, there's going to be a development of some body burden of lead.

Q Why not limit the policy to those women who are planning pregnancies?

[164] A A variety of reasons for that. Number one, birth control devices are not a hundred percent effective. Secondly, the best of intentions and resolve can sometimes be forgotten under the pressure or the circumstances of a given incident or moment and there's too great a risk, there's too great a frequency of unplanned pregnancies, which I think we all know, and maybe it's happened to us or it happens to our friends.

Q The policy, as I understand it, defines an unacceptable work station not only on the basis of blood leads but on the basis of air leads as well; why is that?

A Number one, the employee's exposure is variable from employee to employee because so great a contribution is dependant upon the employee's own practices.

Secondly, individual biological response to that exposure, the amount of lead one absorbs from a given exposure is going to be different. And whereas, some people might respond in a given job very little, others may respond a great deal.

Q The policy uses a single air sample or single blood sample as a basis for determining that a job is unacceptable; why is that done instead of the use of a mean or median?

A Well, a mean or median implies a range and if you had a random distribution, everyone would have an opportunity for a random high reading and random low readings, but practically, what usually happens is your most experienced people will usually have the best work practices and, therefore, the lowest exposures and the lowest blood leads. You're newest people would usually be at the high end of that range.

[165] So if you picked a job where the median or mean was at a certain level, chances are your newest people would be the ones that would exceed the number on the upper end of the range and that's basically unacceptable. We have to make sure that we are controlling that exposure and that absorption to below the levels that we have indication are safe.

* * * *

[167] Q Did Johnson Controls consider alternatives to addressing the problems of fetal exposure other than the existing current fetal protection policy?

A Yes.

Q What were the alternatives and why were they rejected?

A Number one, the voluntary guidelines that we had in effect for five plus years which, as I mentioned earlier, were not effective in controlling the blood leads of women who were capable of bearing children below 30, and even more seriously, they were not successful in preventing pregnancies with blood leads above 30.

We've also, as I mentioned yesterday, have been seeking for a period of time to try to develop alternate batteries to low lead acid batteries and that has not been successful.

As we were developing this particular policy, we looked at how long we thought it would take us to be able to engineer lead exposures down to the 30 air and to the level that [168] we could be assured that blood leads would be below 30 in our plants and the conclusion on that was that there was so much that we did not know yet in how to achieve this, that it would probably be approximately a decade at least before we could achieve exposures that were 30 air or below throughout our plants.

We are continuing to develop engineering controls and we just this summer, as an example, have completed the installation of a major make-up air system in the element assembly and intercell welding departments here in the

Fullerton plants and this type of practice is an ongoing one for us.

We continue to look at options that may be available and certainly are open and will continue to be open to possible alternatives and suggestions that may offer an opportunity to modify our present program.

Q In terms of the engineering controls, are those controls to lower the levels of lead in the air available for purchase and how are they developed?

A Well, typically, the concept of what you're trying to do of reducing an exposure at a given work station in a given operation is something that you have to develop yourself. You've got to document what the sources of exposure are, how they arise and then try to determine how they can be controlled. And from that determination, then you have to try to develop what equipment or hardware, what designs, mechanical designs will work.

The individual pieces that go into a system, some of them are custom designed and fabricated and some may be [169] purchased on the outside; such as fans, bag houses or other dust collectors, make-up air units. These are basically standard items that can be purchased.

But the most critical component of the effectiveness, that speaks to the effectiveness of these systems, is the design of the hooding or the duct work, the tamping stands, the innovative design on material handling systems. Sometimes in order to be able to make a given change to control exposure or to further reduce it, you may end up having to make up modifications to the process to allow you to do that and it's a time consuming process. It's an evolutionary process. It's not something that you typically can move in one bold stroke and completely solve all of the exposure problems in a given department. You take a step. You analyze the progress you've made with that step. You then determine what your remaining problems or sources of exposure are, determine how to best control those and proceed to the next level.

And as we learn a new step and try it at one of our plants and if it proves successful, we then proceed to implement it in the other plants. And when you're dealing with 14 plants, there's a process here. You make advances, you know, some advances have been made in just about every plant where something new has been developed and it's been a case of once that proves convenient, you extrapolate it and adapt it and design it to put in the other plants.

Q Is the technical know-how currently available to reduce the air leads and blood leads at all plants at all work stations below 30?

[170] A Do we know how today to do it, no. It's something that we still have to study to learn. It's technology that has to be developed.

Q What measures, if any, is the company taking with respect to the medical literature and the scientific evidence in this area?

A This is something which is a matter of ongoing review. We stay abreast of the literature as it develops through our trade association. We contribute funds toward the support of research, primary university research, that is conducted in various environmental health areas including reproductive effects.

As a matter of fact, we had offered to make available our Fullerton plant here, the work force in our Fullerton plant, subject to the individual's willingness to participate in a study, on the effects of lead exposure on male reproductive effects. This was a study that was developed and under the direction of our plant physician who is a professor—or I think it's a professor—in the medical school at University of California, Irvine, Dr. Dwight Culver.

Unfortunately, that particular study did not get done because the government grants that were sought for the study did not come through. But this is something that we continue to be open to and to be willing to participate in. And, for instance, Dr. Blejer yesterday mentioned the Cooper Gaffey study which was, that was a mortality

study but the populations from two of our plants were included in that study as well.

* * * *

[179] Q Do you have any employees that are required to wear respirators full-time in the plant?

A Do we have employees who wear respirators full-time in the plants, yes.

Q Are all of their blood leads below 30?

A No.

* * * *

[LEAD HYGIENE PROGRAM]
(Beaudoin Aff., Ex. C)

GLOBE-UNION INC.

STANDARD PROCEDURE

Division CORPORATE
Section CORP. RELATIONS
Date Effective 11-23-73
Date Revised 06-15-79
Bulletin No. 1-953-03
Endorsed by V.P., CORPORATE RELATIONS,
V.P. BATTERY MFG.
Distribution A, 1X-18, 2X-29, 3X-39
Subject LEAD HYGIENE PROGRAM

I. *POLICY*

A. It is Globe-Union policy:

1. To pro[illegible] the health of its employees whenever [illegible] nature of their duties may expose them to a health hazard.
2. To prevent members of employees' families from becoming exposed to a health hazard arising out of Globe-Union employment.
3. To maintain its employees' blood lead concentrations below 60 micrograms/100 ml of blood (60 ug%).

B. Because a potential health hazard in Globe battery manufacturing plants arises from exposure to lead in the form of dust or fume, accepted industrial hygiene methods shall be utilized to protect employees from excessive exposure to and absorption of lead.

C. It is Globe-Union policy to control employee exposure to lead whenever feasible by means of

engineering controls, good housekeeping practices and good work practices, and to control lead ingestion by requiring good employee habits of personal hygiene. Respirators shall be worn only where provision of engineering and administrative controls is neither feasible nor adequate, or as a temporary or emergency measure until control of airborne lead exposure can be established by one of the preferred methods, or upon employee request.

II. *SCOPE*

This bulletin applies to each battery manufacturing plant or other facility where an employee may be exposed to airborne lead at or above 30 micrograms per cubic meter of air (ug/M^3) except for paragraph V.B.1, which applies wherever an exposure to airborne lead at any concentration may occur.

III. *REFERENCES*

SPB 1-953-04	Biological Monitoring Program for Lead Workers
SPB 1-953-07	Air Sampling Program
SPB 1-953-11	Respirator Wear Policy
SPB 1-953-12	Procedure for Care, Use and Maintenance of Respirators
SPB 1-941-09	Wash-Up and Clothes Changing Procedure
SPB 1-953-05	Work Clothing for Lead Workers in Battery Plants

IV. *RESPONSIBILITY*

A. The Plant Manager, with the assistance and counsel of appropriate Division and Corporate staff, is responsible for taking all measures

necessary to protect the health of employees and maintain a state of compliance with applicable Federal and/or State occupational health regulations.

The Plant Manager shall assign responsibility for each of the following functions:

1. Implementation of air sampling and respirator programs.
2. Establishment and implementation of programs for routine inspection, cleaning and preventive maintenance of all equipment exhaust and ventilation systems in the plant.
3. Establishment and implementation of plant housekeeping programs.
4. Establishment and implementation of work practice controls.
5. Establishment and implementation of programs to educate workers to the health hazard posed by lead and to train them in its control.
6. Establishment and implementation of personal hygiene surveillance programs.
7. Documentation of administrative solutions, where these are employed to control employee exposure and comply with regulations.
8. Implementation of programs of biological monitoring in the plant under the medical supervision of the consulting plant physician.

When the plant is under a major airborne lead citation, a single individual, the Plant Manager or his designee, shall coordinate the entire compliance effort in each plant; this includes monitoring of health hazards, the plant engineering

maintenance effort and motivation of employees toward good housekeeping and good work practices, as well as maintaining adequate communications between the plant and appropriate staff managers in Milwaukee headquarters.

B. The Corporate Medical Director is responsible for establishing biological monitoring and medical surveillance programs as needed to monitor and safeguard the health of employees.

C. The Corporate Manager of Health, Safety and Environmental Control is responsible for establishment and review of this policy and procedure, for establishment of industrial hygiene programs and for auditing compliance with this policy and procedure.

D. The Manager of Manufacturing Facilities is responsible for developing programs to provide engineering control of the lead hazard in the plants where this is necessary and for auditing the installation, operation and maintenance of the engineering control systems.

V. *PROCEDURE*

A lead hygiene program consisting of the following elements shall be implemented.

A. Housekeeping

1. Good housekeeping shall be maintained throughout each plant.
   a. Compressed air may not be used on any surface where lead accumulates.
   b. Vacuuming or washing are the accepted methods for cleaning. Only when they have been found ineffective may alternative methods be used.
2. A program of regular housekeeping inspections shall be instituted and maintained.

B. Employee Training

1. Any employee who may incur an exposure to airborne lead in any concentration shall be informed at once of the content of Appendices A and B in OSHA's Lead Standard.

   a. In battery plants, all employees shall be informed at the time of hire. Current employees shall be informed within 90 days of the receipt of Appendices A and B in the plant.

2. Any employee who may incur an exposure to airborne lead at or above 30 ug/M^3 shall participate in a training program which shall be repeated at least annually for each employee. For current employees, the initial training shall be completed by August 28, 1979. For new employees, the initial training shall be given prior to initial placement.

3. The training program shall encompass the following points:

   a. The content of OSHA's Lead Standard and its appendices A and B.

   b. Departments or work stations at which exposures above 30ug/M^3 could be experienced.

   c. The engineering controls and work practices which pertain to each employees job.

   d. Good personal hygiene practices required to minimize lead absorption.

   e. Good housekeeping practices.

   f. The purpose, proper selection, fitting, use and limitations of respirators.

   g. The purpose and description of the medical surveillance program and medical removal protection program including information on health hazards associated with excessive exposures to lead.

   h. A caution to employees not to routinely use chelating agents to remove lead from their bodies and not to use these agents at all unless under the direction of a licensed physician.

   i. The contents of any OSHA compliance plan in effect.

   j. The distribution to the employees of any information made available to the Company by OSHA concerning the Occupational Safety & Health Act, its regulations, or the Lead Standard.

C. Engineering Controls

1. Provision and maintenance of adequate ventilation on equipment and at work stations to capture lead dust or fume at the point of its generation.

2. A program of regular monitoring of ventilation system performance designed to permit early detection and correction of any deterioration in ventilation system performance.

3. A program of regular visual inspection of oxide storage and transfer systems to permit the detection and correction of oxide leaks.

D. Biological Monitoring

A biological/medical surveillance program to monitor employees' lead absorption and protect their health.

E. Air Sampling

A program of regular air sampling to monitor employee airborn lead exposure, designed to permit early detection and correction of significant increases in exposure, whether these arise from increased air-lead concentration or increased duration of exposure.

F. Respirator Wear

A program of respirator wear to provide employees with temporary emergency protection against excessive exposure to airborne lead.

G. Periodic Review of Industrial Hygiene Records

A program of regular review of each employee's industrial hygiene exposure data, supplemented by records of duration of exposure (overtime work), employee work practices and general workplace conditions.

This will permit early detection and correction of poor housekeeping practices, inadequate and/or malfunctioning engineering controls, poor work practices and weekly exposures, the duration of which may be inappropriately long, in view of the existing airborne lead concentration levels.

H. Personal Hygiene Program

1. Smoking, eating and drinking (except from fountains) are permitted only in the cafeteria and main office area of battery manufacturing plants where hands and face washing facilities are available and the use of which is enforced.

2. Tobacco products, non-food chewing products (e.g. chewing gum), purses, and unapplied cosmetics are permitted only in the locker room, cafeteria, and main office area of battery manufacturing plants.

3. Wash-up prior to eating or smoking and daily showers at end of shift are *required* for all employees who are exposed to airborne lead at or above the permissible exposure limit or who work in lead oxide areas. It is recommended that all other employees also do this.

4. All employees exposed above the permissible exposure limit shall be provided with separate work and street clothes lockers.

5. At least every other working day, work clothing changes are required for all employees who are exposed to airborne lead at or above the permissible exposure limit or who work in lead exposure areas. Safety work shoes are also required for these employees. Work clothing and work shoes are also required for these employees. *Work clothing and work shoes of these employees may not be taken out of the plant*, in order to prevent exposure of family members to lead. It is recommended that all other employees also do this.

6. A program of surveillance of personal hygiene practices including, but not limited to, the above measures shall be implemented, the results of which shall be used to correct improper or inadequate prac-

tices in order to reduce resulting lead absorption.

I. A program of regular review of the results of the personal hygiene surveillance program and of employee industrial hygiene and biological monitoring data shall be conducted by the plant nurse to determine what, if any, additional measures are necessary to prevent or reduce lead absorption.

J. In instances where employees are threatened with excessive exposure to or absorption of lead, plant management shall undertake to identify the source of the heightened exposure and reduce or eliminate it. To accomplish this:

1. Ventilation and exhaust system performance and records should be checked.
2. Production equipment should be checked for leaks, excessive operating temperature and other evidence of improper condition or function.
3. Housekeeping performance and records should be reviewed.
4. Employee work practices should be reviewed.
5. Employees hygiene practices should be reviewed.

Appropriate steps shall be promptly taken to correct any inadequacies discovered.

K. Full compliance with required housekeeping, work practices, respirator wear and personal hygiene measures shall be achieved through plant disciplinary procedures where necessary.

L. Recordkeeping

1. All employee industrial hygiene and biological monitoring/medical records shall be kept for at least 40 years or for the duration of employment plus 20 years, whichever is longer. Medical removal records shall be kept for at least the duration of employment.
2. All personal exposure air sampling results and blood lead sampling results will be reported in writing to the employee sampled within five days of receipt of results.

[BIOLOGICAL MONITORING PROGRAM]

(Beaudoin Aff., Ex. D)

JOHNSON CONTROLS

STANDARD PROCEDURE

Division GLOBE

Section HSECD

Date Effective 09-01-81

Date Revised 03-25-83

Bulletin No. 3-953-04

Endorsed by

VP BATT. MFG., DIR. PERS. & IND. RELATIONS

Distribution 3X-39 & Special

Subject

BIOLOGICAL MONITORING PROGRAM FOR BATTERY DIVISION EMPLOYEES

I. *SCOPE*

This standard procedure establishes the program for biological monitoring and follow-up for those employees whose duties may expose them to lead.

II. *STANDARD PRACTICES*

A. Applicability

This procedure applies to all Battery Division employees experiencing occupational exposures to lead.

B. References

1. SPB 3-950-20, Medical Surveillance Program
2. SPB 3-950-21, Preemployment Examinations
3. SPB 3-954-01, Fetal Protection Program

4. IHP 1-404, Assessment of Lead Exposure and Absorption (Industrial Hygiene Procedure)
5. HSP H-451, Biological Monitoring—Lead (Health Service Procedures)

C. Objectives

To protect the health of its employees whenever the nature of their duties may expose them to occupational health hazards and to prevent any employee from having an occupational exposure which may aggravate any other preexisting disease or condition.

D. Responsibilities

1. The plant manager shall be responsible for the implementation of this standard procedure through the plant physician, nurse and personnel manager.
2. The Manager of Health, Safety & Environmental Control is responsible for the establishment and review of this standard procedure and for auditing compliance thereto.

E. Placement

1. Preemployment

To evaluate suitability of placement in lead exposure, applicants for employment in a battery manufacturing plant will have a blood sample drawn as part of their preemployment physical examination, the results of which must be reviewed by the plant nurse and/or physician prior to hiring. This will be used to establish the employee's base-line blood lead, hemoglobin and ZPP levels.

2. Transfer Placements to Lead Areas

   a. No employee of childbearing capability will be placed in jobs where the airborne lead exposure is at or above 30 ug/m³ and the blood lead level of any of the incumbents over the past year (transfers excluded) was at or above 30 ug%.

   b. To ascertain suitability of transfer into lead exposure, container molding plant transfers into the lead casting area will have a pretransfer evaluation including blood lead, hemoglobin and ZPP. The results must be reviewed by plant nurse and/or physician prior to transfer.

   c. Battery plant transfers into lead exposure areas, i.e., at or above 30 ug/m³, will have:

      1) A pretransfer evaluation including blood lead, hemoglobin and ZPP taken no more than three weeks in advance, the results of which must be evaluated by the plant nurse and/or physician prior to transfer.

      2) Post-transfer monthly assessment for first three months in exposure, including a blood lead, hemoglobin and ZPP analysis.

   3. All placements (initial or transfer) are subject to prior medical review and approval by the plant physician.

F. Sampling Frequency

   1. In battery plants a ZPP analysis (with interpretation to the employee) will be executed at the time each blood lead sample is drawn.

   2. In poly plants an FEP analysis shall accompany blood lead analysis (with interpretation to the employee on receipt of the results).

   3. Blood samples will be drawn, according to the following schedule, for blood lead, hemoglobin and protoporphyrin analysis on all battery manufacturing plant employees, and on those molding plant employees who cast lead.

      a. Monthly (without exceptions)

         1) All newly hired battery manufacturing and molding plant lead casting employees, except office staff, for the first three months of their employment.

         2) All employees newly transferred into lead exposure at or above 30 ug/m³ for the first three months of such placement.

         3) All employees whose most recently measured blood lead level is at or above 40 ug% and/or whose most recently measured ZPP level is at or above 60 ug%.

         4) All employees of childbearing capability whose most recently measured blood lead level is at or above 30 ug%.

         5) All employees who currently are removed from lead exposure due to lead absorption or lead effect, during the period of their transfer or medical leave.

         6) All employees returning from lay off/leave of two months or longer, who will be exposed to airborne lead of 30 ug/m³ or greater, for the first three months of such placement.

b. Every two months (bi-monthly)

All employees of childbearing capability whose most recently measured blood lead levels are 20-29 ug%.

c. Every three months

All employees of childbearing capability whose most recently measured blood levels are less than 20 ug%.

d. Every six months

All battery manufacturing plant and molding plant lead casting employees whose blood lead is under 40 ug% and whose protoporphyrins are under 60 ug% after the first three months of employment.

4. A ZPP analysis only will be done every two months (bi monthly) for:

   a. All employees who work in lead exposure greater than 30 ug/m^3 and whose most recent blood lead level is less than 40 ug% and/or most recent ZPP reading is less than 60 ug%.

   b. All employees of childbearing capability whose most recently measured blood lead levels are 20-29 ug%, in the monthly intervals between blood lead samples.

5. Under all circumstances any change from the above specified sampling frequency shall be established only upon order of the plant physician when, in his professional judgement, other biological indices of lead effect indicate a change in order to protect the health of an employee.

G. Processing and Identification of Samples

1. Blood samples shall be drawn in the tube provided by ESA Laboratory and transmitted by the *fastest* means which can be determined by contacting the local post office, UPS or Federal Express office.

2. Refer to HSP - H 451-03 for specifics of procuring supplies, specimen identification and shipping.

3. All blood samples collected under this program shall be analyzed at the ESA Laboratory in Bedford, Massachusetts.

H. Results

1. Copies will be mailed by the laboratory to the plant nurse, the plant physician, the Medical Director, and two copies will be sent to the Health, Safety and Environmental Control Department, X12, Milwaukee.

2. All employee blood lead sample results will be reported to the affected employee, in writing, on Form 5-29, within five days of receipt in the plant.

I. Recordkeeping

1. Recording of biological data will be done on the "Biological Monitoring Record," Form 10-128 maintained for each employee. The identifying information should include the employee's name, SS number and Globe plant.

2. The Biological Monitoring Record constitutes a *legal medical record.* For this reason, individual airborne lead personal exposure data will *not* be recorded on Form 10-128.

3. The Biological Monitoring Record itself is a historical occupational medical record. It should include:

   a. Job title, work station site number and other pertinent data for each employee, updated at each job transfer.

   b. A record of unusual complaints, hospitalizations, etc.

4. A copy of the Biological Monitoring Record may be released to the employee's personal physician on receipt of the employee's signed authorization. It must be reviewed with the employee upon request.

5. Monthly, the removal or restriction (including overtime restrictions) for any employee from lead exposure, and the subsequent return to unrestricted work, is to be reported to the Health, Safety & Environmental Control Department, X12, Milwaukee, on Form 5-27.

6. Removal from lead exposure is OSHA reportable only if the transfer is based on the physician's medical judgement because of clinical or subclinical manifestations in the employee. Usual recordkeeping of occupational illness is to be instituted with lost and restricted days recorded in Column 7.d. of the OSHA 200 form.

   Removal based solely on numerical criteria is *not* OSHA reportable and need not be recorded on the OSHA 200 form.

J. Records Retention

Medical and biological records must be kept for at least 40 years or for the duration of employ-

ment plus 20 years, whichever is longer. Transfer and medical leave of absence records must be kept for at least the duration of employment.

K. Actions Required in Plant

1. General

   a. Each employee's blood lead record will be reviewed by the plant nurse with each new entry to determine need for further follow-up.

   b. As blood lead levels exceed the 40 ug% and higher decade markers, an Assessment of Lead Absorption should be conducted to reduce lead absorption. In general, the following factors should be addressed when lead absorption is reviewed:

      1) Respirator wear—proper wear time, enforcement, facial hair, proper respirator worn, and fit testing. Consideration should be given to imposing respirator wear at 40 ug/m^3.

      2) Hygiene practices—including wash-up, showers, use of tobacco products, and clothing contamination.

      3) Lead exposure levels—proper functioning of engineering controls, proper work practices being followed.

      4) Other factors—including overtime, outside job activities, and worker training.

   These factors are discussed further in Industrial Hygiene Procedure Bulletin No. 1-404, "Assessment of Lead Exposure and Absorption."

c. Physician Review

1) The plant physician shall review the employee's biological monitoring record and airborne lead exposure records each time lead absorption has reached 50 ug%.

2) The physician will review and interpret all other biological indices, particularly those that assess interference with heme synthesis or renal function, upon receipt of these results.

3) Any individual who has medical complaints will see the plant nurse and, if necessary in the nurse's judgement, will be referred by the nurse to the physician for documentation of the nature of the employee's illness.

2. Blood lead levels 40 ug% or greater or ZPP levels 100 ug% or greater.

a. Take prompt action to reduce the employee's absorption of lead.

1) Work Practice Review shall be initiated by the immediate supervisor. Review will include adherence to respirator, work and personal hygiene practices.

2) Impose full shift respirator wear.

3) Industrial Hygiene and Safety Coordinator should initiate assessment of respirator fit, to include: review of facial features, proper respirator being worn, adherence to wear time requirements and possible refit testing.

3. Blood lead level transfer criteria and action plan. Action required by "a" through "d" of

this section will be implemented through the following schedule: 03/01/83—05/31/83—Blood lead results of 60 ug% or greater, confirmed.

06/01/83—08/31/83—Blood lead results of 60 ug% confirmed *or* blood lead average of 55 ug% and above, whichever comes first. (Calculate average of last three blood sample results, or all of those conducted over the last six months, whichever is longer.)

09/01/83—Fifty (50) ug% blood lead average and above.

a. Except where the employee's most recent blood lead result is 40 ug% or less, transfer employee to a work location where the lead exposure is consistently below 30 ug/m^3, and where the lead absorption level of employees indigenous to that area is consistently below 40 ug%.

b. Monthly, the plant physician will follow-up the employee beginning with receipt of the blood lead result which triggers the transfer and until the lead exposure restriction is removed.

c. Employee may be returned to lead exposure above 30 ug/m^3 when blood lead level is confirmed below 40 ug%. Exception: employees transferred because of blood lead average of 55 ug% and above during period 06/01/83—08/31/83 may be returned to lead exposure above 30 ug/m^3 when the blood lead average drops below 49 ug%.

d. Consult with Health, Safety and Environmental Control Department.

4. Employee of childbearing capability (Refer to II.B.3).

   a. Individual with blood lead at or above 40 ug% (confirmed).

      1) Implement full shift respirator wear.

      2) Transfer as soon as possible to an "acceptable" work station as defined in SPB referenced in II.B.3. Implement Medical Removal Protection benefits.

   b. Individual with blood leads 35-39 ug%.

      1) Implement full shift respirator wear.

      2) After two readings in this range encourage voluntary transfer. Restrict exposure to 40 hours/week in air lead levels greater than 30 ug/m^3.

      3) After four readings in this range, transfer as in II.K.4.a.2. above.

   c. Individual with blood leads 30-34 ug%.

      1) Implement full shift respirator wear.

      2) After three readings in this range, encourage voluntary transfer. Institute overtime restriction as in II.K.4.b.2. above.

      3) Give priority to transfer to an acceptable opening in the same job class.

      4) After six readings in this range, transfer as in II.K.4.a.2. above.

   d. If an employee's blood lead rises to greater than 30 ug%, institute steps as outlined in II.K.4.a., b., c., above depending on blood lead level.

NOTE: Actions at steps b and c are triggered by the *total* number of consecutive readings at or above 30-39 ug%.

5. The plant physician may recommend removal or restriction of an employee on the basis of medical judgement other than the above.

6. All information, related to the problems uncovered and the corrective action taken as a result, will be communicated in writing to the plant physician and documented. A copy of this information will be sent to the Health, Safety and Environmental Control Department, X12, Milwaukee.

L. Medical Removal Protection (MRP)

When an employee is removed from lead exposure pursuant to this practice, medical removal protection benefits required by OSHA regulation will be provided as follows:

1. In the case of lead related transfers, the employee shall be paid average straight time hourly earnings (as computed for holiday pay) for actual hours worked or actual earnings, whichever is higher, until he/she is returned to his/her original job or for 18 months whichever is shorter. This applies to all transfers under Section II.K.4. and to those transfers in Section II.K.3. where the employee had an airborne lead exposure of at least 30 ug/m^3. This also applies to all transfers under Section II.K.5. except that the 18 months limitation does not apply.

2. In cases of occupational disease pertaining to lead absorption, as determined by the com-

pany physician and for periods during which the employee is eligible for workers compensation, the employee shall be compensated at average straight time hourly earnings (as computed for holiday pay) less any such workers compensation benefit received for a period not to exceed 18 months. In such cases, the employee shall retroactively receive compensation for any waiting period prescribed by the Workers' Compensation law.

SPECIAL DISTRIBUTION

Battery Division Plant and Occupational Health Nurses

[MEDICAL SURVEILLANCE PROGRAM]

(Beaudoin Aff., Ex. F)

JOHNSON CONTROLS

STANDARD PROCEDURE

Division GLOBE

Section HSECD

Date Effective 09-01-74

Date Revised 02-10-83

Bulletin No. 3-950-20

Endorsed by VP BATT MFG., DIR PERS & IND REL DIV MED DIR

Distribution 3X-39 & SPECIAL

Subject MEDICAL SURVEILLANCE PROGRAM

I. *SCOPE*

This standard procedure is applicable to employees and applicants for employment at all domestic Globe Battery Division facilities.

II. *STANDARD PRACTICES*

A. Responsibility

The Globe Battery Division is to provide medical evaluations to each employee or applicant prior to employment and to assure that neither will be placed on a job where he/she is not physically and mentally capable of performing that job safely, protecting his/her health and that of fellow workers.

B. Pre-employment Examinations

1. Prior to hiring, each applicant considered for employment in the following positions shall have a complete medical history and a thorough physical evaluation by the plant physician:
   a. All manufacturing plant salaried positions.
   b. All staff and sales salaried positions in position grade 52 and above.
   c. All staff and sales salaried positions in position grade 51 and below, aged 35 and older.
   d. All hourly positions.
2. Applicants for these positions must understand that hiring eligibility is subject to the concurrence of the company designated physician.
3. Prior to hiring, each applicant for salaried employment not required to undergo the pre-employment in II.B.1. above, shall complete a pre-employment medical history which shall be reviewed by the facility nurse and/or physician.
4. All female applicants for battery manufacturing hourly jobs will be required to provide medical documentation of inability to bear children. All female applicants for placement in salaried jobs in battery plants where blood lead in the last year has been $\geq$ 30 ug% must present the same medical documentation. This also applies to placement in jobs in poly plants where blood leads $\geq$ 30 ug% were recorded in the past year.
5. Medical findings which require a physician's attention will be explained to the applicant or

new employee, who shall be referred to his or her personal physician.

6. Under certain circumstances medical action may be requested of an applicant as a condition of employment. Any medical condition not controlled or requiring treatment shall be treated to the point of correction or acceptable medical control prior to initial placement.
7. Whenever the examining physician restricts an applicant for physical or mental health reasons, the decision of the physician shall be final. An applicant restricted for medical reasons should be placed on a job consistent with his/her capabilities.
8. The personnel manager is responsible for determining if a job consistent with the restrictions of a prospective employee is available.
9. The medical history and results of the physical examination are to be treated as confidential information and kept in locked medical files at the plant under the control of the plant nurse and the plant physician. Information contained in such files is to be released to any third party only over the employee's signature. The company agrees to provide each employee a complete copy of his/her company medical file upon his/her written request provided the file is first reviewed with the employee by the company doctor and/or nurse. The frequency is not to exceed once per year.

C. Periodic Occupational Examinations

1. General

   A medical examination(s) shall be made under any circumstance wherein an employee is exposed beyond a defined action level to a

known toxic agent or health hazard or complains of symptoms which may be related to exposure to such materials, such as lead, arsenic, cadmium, silica, acrylonitrile, and noise. Frequency and content of these examinations will be specified in sections dealing with the specific material, or, where absent, by the Division Medical Director.

2. Respirator Wear

A medical examination will be made whenever an employee complains of a physical problem or breathing difficulty when using a respirator provided there is not an approved respirator which will alleviate the problem.

3. Lead Exposure

A periodic occupational examination includes a medical history, required laboratory tests and a physical examination by the company designated physician. The medical history must be updated and blood lead sampling must be performed for each examination. Other portions of the examination may be waived if they were performed within the previous year, and, in the physician's judgement, the history or biological monitoring results show evidence of not requiring further follow-up at this time.

a. Each employee who had a blood level of 40 ug% or greater during the preceding 12 months shall be examined at least annually. This includes examinations covered under Section II, subparagraphs B.; C.3.b.; D.2., 3., and 4.

b. Prior to initial assignment to a work station or job for which airborne lead concentrations are at or above 30ug/M^3.

c. Any employee who has medical complaints or symptoms should see the plant nurse. If necessary in the nurse's judgement, the employee will be referred to the appropriate physician to document the nature of the employee's illness.

d. Each employee currently under work restriction, preventive transfer or medical leave of absence (due to a risk of sustaining material impairment to health) will be examined at a frequency to be determined by the plant physician.

e. An employee may submit a request to the plant nurse for a consultation with the plant physician for advice concerning lead exposure and its effects on the employee and the family's health.

4. Arsenic Exposure

An employee shall have complete medical history, a physical examination and appropriate laboratory tests prior to assignment where arsenic is used and yearly thereafter when the exposure is at or above 5 ug/M^3. Until a separate standard procedure bulletin on "Periodic Occupational Medical Examinations —Arsenic" is issued, the plant nurse shall contact the Division Medical Director for the specific content of this examination.

5. Silica Exposure

An employee exposed to silica will have a medical history, a physical examination and appropriate laboratory tests prior to a job assignment and yearly thereafter. Until a separate standard procedure bulletin on "Periodic Occupational Medical Examination—Silica" is

issued, the plant nurse shall contact the Division Medical Director for the specific content of this examination.

6. Acrylonitrile Exposure (Carcinogenic Exposure)

   An employee shall have a complete medical history, a physical examination and appropriate laboratory tests prior to assignment where acrylonitrile is used and yearly thereafter when the exposure is at or above 1 ppm. Until a separate standard procedure bulletin on "Periodic Occupational Medical Examinations —Acrylonitrile" is issued, the plant nurse shall contact the Division Medical Director for the specific content of this examination.

D. Medical Re-Examination

1. In signing the company "Application For Employment," Form 10-81B, each applicant agrees to a medical examination prior to employment, periodically thereafter when requested or required, and at the time of termination, if required.
2. Re-examination of an employee may be required anytime the plant nurse or physician deems it medically advisable.
3. Request for re-examination of an employee may be made by members of plant management with concurrence of the plant nurse or physician.
4. To assure proper job placement, re-examination by a company designated physician will be required upon the employee's return from a medical leave of absence (either personal or occupational) which is considered serious in

the judgement of the plant nurse and/or physician. A medical statement from a physician will be required for granting a non-occupational medical leave of absence, to be reviewed and approved by the plant nurse and/or physician.

5. A re-examination shall be required upon the employee's return from a layoff or strike of two months or longer under paragraphs II.C. 2. and 3. Where the employee has had other employment during the period of layoff or strike, the re-examination shall be required regardless of the length or strike .

E. Truck Driver's Physical Examination

1. Truck drivers are required by D.O.T. rules to have a current physician's certificate. These certificates are valid for 24 months.
2. Copies of drivers' health history and physical examination will be kept in medical files at the plant, under the control of the plant nurse and physician.
3. The Medical Examiner's certificate will be transmitted to the plant's Manager of Transportation or Personnel Manager for inclusion in the employee's personnel records according to D.O.T. regulations.
4. Plant medical staff will assure that examinations are given and certificates renewed within the 24 month requirement.

SPECIAL DISTRIBUTION

All Plant Occupational Health Nurses
All Plant Physicians

[PERIODIC OCCUPATIONAL MEDICAL EVALUATION]

(Beaudoin Aff., Ex. G)

GLOBE-UNION INC.

STANDARD PROCEDURE

Division CORPORATE

Section CORP. RELATIONS

Date Effective 08-01-79

Date Revised ORIGINAL

Bulletin No. 1-950-22

Endorsed by VP CORP. REL. VP & GM BATT DIV
CORP. MED. DIR.

Distribution A, 1X, 11, 3X-39 & SPECIAL

Subject PERIODIC OCCUPATIONAL
MEDICAL EVALUATION—LEAD

I. *PURPOSE*

This bulletin defines the specific procedure for conducting and documenting yearly and periodic examinations for lead exposure

II. *SCOPE*

A. To insure that no employee has any permanent disability or irreversible toxic effect from lead exposure.

B. The early detection of any non-occupational disease state which continued exposure to lead would aggrevate the condition.

C. Education of the employee and a check of his knowledge concerning the hazards associated with his job and exposure to lead.

D. To instruct the employee in proper use of protective equipment, its use where indicated.

E. To provide standardized health data which will assure quality control of the biological monitoring program.

F. To provide standardized data which lends itself to statistical and epidemiological analysis for improvement in engineering and hygiene programs or assurance that all programs are sound and cost effective.

III. *REFERENCES*

SPB 1-950-20 and 21, 1-953-04

IV. *IMPLEMENTATION*

A. Frequency of Evaluation

1. Yearly for employees exposed to airborne concentrations of lead at/above 30 mcg/M^3.

2. Within twelve months of a blood lead at or above 40 mcg/100 ml if not examined under subparagraph IV.A.1 of this procedure.

3. When, in the judgement of the plant physician, an employee has complaints or symptoms which must be differentiated from those of lead effect.

B. Periodic Evaluation

1. Employee complaint or symptoms from questionable effect of lead.

a. Interim history (form 10-86).

b. Extent of physical examination shall be at the discretion and professional judgement of the company designated plant

physician to adequately evaluate the employee.

c. Additional laboratory tests shall be adequate to properly evaluate the employee's symptoms and to make a sound differential diagnosis of the causes of the symptoms.

2. Yearly evaluations required for employees exposed at or above the action level of lead or absorption of lead above 40 mcg/100 ml blood.

a. Re-examination history shall be complete on Form No. 10-86. The history shall be reviewed by the plant nurse. Corrections shall be noted by the nurse and discussed with the employee prior to referral to the company designated plant physician for examination and evaluation.

b. Physical re-examination shall be completed on Form No. 10-86.

1. The extent of the examination shall be thorough to include skin, fundiscopic, ostoscopic, chest, abdomen, musculoskeletal, and neurological assessment for detection of any manifestations of effects due to lead exposure.

c. Laboratory tests

1. CBC and differential.

2. A blood chemistry of at least SMA12 to include glucose, creatinine and BUN.

3. Zinc protoporphyrin, Urinary d-ALA Spot., blood lead.

4. Urinalysis with microscopic examination.

d. Special laboratory tests

1. Pulmonary spirometry when indicated by history of respiratory difficulty or previous difficulty with respirator wear.

2. Audiogram when in exposure at or above 90 dbA.

e. A summary of findings shall be made in writing and approval for placement shall be made in the appropriate space on Examination Form 10-86.

f. Medical classification (A—qualified for any type of work; B—has medical condition requiring permanent restrictions, such as, no lead exposure, no respirator wear, no heavy lifting, etc.) shall be reviewed on any required changes from the previous classification explained. Temporary restrictions shall be communicated in writing on Form 10-86 as to nature, extent and duration, but shall not affect the permanent medical classification unless so indicated.

g. New abnormal findings (i.e., diabetes, hypertension, etc.) shall be reported to the employee and the employee shall be referred to his personal physician. Upon request, a copy of the laboratory report and physical findings shall be sent to his personal physician.

SPECIAL DISTRIBUTION:

Battery Division Branch &
Milwaukee nurses (14)

[POLICY GUIDELINES FOR WOMEN IN LEAD EXPOSURE]

(Beaudoin Aff., Ex. J)

GLOBE-UNION INC.

COMPANY CORRESPONDENCE

[Signature Omitted]

TO: Battery Plant and Personnel Managers

ATTENTION:

SUBJECT: Women In Lead Exposure

FROM: Robert W. Schindler
Corp. Health & Safety

DATE: June 9, 1977

Attached are policy guidelines for the employment in lead exposure of women capable of bearing children.

This change has come about slowly as more and more medical opinion and evidence is persuasive of the risk to the unborn, developing child.

We have stopped short of excluding women capable of bearing children from lead exposure, but do feel strongly that those women who are working in lead exposure (defined herein) and those women who wish to be considered for employment to be advised that there is risk, that we recommend *not* working in lead if they are considering a family, and further that we ask them to sign a statement that they have been advised of this risk.

The enclosed gives some background behind this decision, outlines the implementation of the policy, covers a suggested content in such a "recital of risks" and a copy of the form to be signed.

We suggest that you review this carefully, raise any questions you may have with me and make plans to review it with the union committee before implementing.

A standard procedure bulletin covering this adopted policy will be issued at a later date.

Globe-Union shares a dilemma along with others who employ women in lead exposures. We are faced with EEO and Title VII on one hand with risk of charges of sex discrimination if we exclude women as a class from lead, on the other hand, with the liability risk of being charged by an affected employee with injury to fetus or lead induced abortion if we allow them to work in lead exposure.

We have seen fit *not* to exclude women as a group from Battery manufacturing operations as a written corporate policy, however, it is becoming increasingly clear that medical concern for the unborn child of a female working with lead or lead oxide is growing in a number of quarters. For the foreseeable future, we see this as a problem despite our continuing best engineering efforts.

Recent evidence is the adoption by the Battery Council International's Environmental Health Committee that "member companies do not employ fertile, gravid, or lactating females in the lead industryies until such time as adequate information has been developed regarding the effect of lead under present exposure conditions".

It is also evident in OSHA's proposed standard on lead when it raises the question, "To what extent are there groups with increased susceptibility to lead in the working population, such as women of childbearing age and should such increased susceptibility, if it exists, be considered in establishing a standard for lead?"

Recent studies of the toxicological effects of exposure to lead, OSHA further states, "raises the serious possi-

bility that the blood lead in the mother might harm the fetus without producing any clinical symptoms of lead exposure in the mother."

We at Globe-Union have taken the position that the mandate of OSHA is to protect the health of *employees.* Although we all share concern, protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.

We believe that pregnancy is almost always a voluntary act and that the subsequent bearing of a child is voluntary. Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.

For these reasons and based upon the current situation, we believe that the decision in each case should properly be made by the individuals immediately involved. The parents, those who bear the direct responsibility of the well-being of the fetus, need to be well informed so that their decisions are made on the basis of full knowledge of the facts and understanding of the implications and risks of occupational exposure of the fertile woman to lead.

OSHA has tried to meet this problem in their proposed "Inorganic Lead Standard" by including a pregnancy test as part of required pre-employment and annual periodic medical examinations. We at Globe-Union take exception to that approach because according to some authorities, a state of pregnancy cannot be determined early enough to prevent possible significant risk to the health of the fetus.

We propose, therefore, that all women between ages of 18 and 49 who can conceive be seen by our plant nurse or our company physician and receive health counseling as to the hazards of lead absorption to any fetus she might conceive and then the female employee be guided by her personal physician to determine whether her personal situation and medical history call for a limitation on her current occupational placement.

We see our role, in view of the present day understanding of the possibility of harm to an unborn child, and pending definitive legal guidelines, as providing facts of the implication and risks of occupational exposure to lead to the women capable of conception working under our roof so they may make an informed decision.

I. *Implementation of Policy*

A. Active Employees

1. Determination by medical department of women currently in lead exposure who are able to bear children. Lead exposure defined as airborne lead concentration in excess of 50 micrograms/M^3 or blood lead levels exceeding 30 micrograms/100 Ml.
2. Recital of risks to individual women by nurse or company physician.
3. Summary statement of Risks to be signed by employee.
4. Arrange transfer to non-lead areas of women who wish to be moved as bona fide openings or bidding procedures make such transfers possible.

B. Prospective Employees

1. All women capable of bearing children considered for employment in battery manufacturing

areas where airborne lead concentrations are greater than 50 micrograms/M ^{3} (TWA) will be advised of the existence of risks to any fetus she may conceive.

2. She will be advised that we do *not* recommend placement in lead exposure if she wishes to have children.
3. If she still wishes to be considered for placement she will as part of the medical examination procedure be asked to sign a "Summary Statement of Risks". Signature to be witnessed by employment interviewer or nurse.

RECITAL OF RISKS

"In the practice of industrial medicine we sometimes don't know all we'd like to know. Falling into this category is the effect of a toxic substance like lead on the human being particularly the unborn, developing child. Lead effect on the adult person is well understood and we keep people safe and healthy even though they may be working with a toxic substance.

But when it comes to the effect of lead on an unborn child, we know a lot less, as you can well imagine; but we do know enough to be able to tell you that there are some risks. Risks you should be aware of because you work in lead.

While each individual reacts differently there is evidence, though not scientifically conclusive, that women exposed to lead have a higher rate of abortion than those in the general population. The evidence is not as clear, for example, as the relationship between cigarette smoking and cancer, but it is enough for us to make plain that if you conceive you should recognize that staying on the job and working with lead oxide may well have an effect on your ability to carry your child to term.

As far as the effect on the unborn child is concerned, even less conclusive medical information is known but even as much of the information regarding the health effects of chemicals, food additives, pollutants, etc. is learned through animal experimentation, there is evidence from that source that animals fed or exposed to airborne lead run the risk of having congenitally affected offspring.

We are controlling the air exposure, providing protective equipment when necessary and monitoring your absorption by blood tests and are confident that if you do your part with good work practices and hygiene habits, you can work without concern for your health; but in the event you become pregnant it adds another dimension to the problem. Lead levels which are harmless to women at work in our plant are possibly sufficient to cause damage to the embryo and developing infant. Not only is it current exposure but since lead in the body sometimes takes many months to be excreted, there can be a risk even after you leave exposure. There is some evidence that fetus may be affected rather quickly following conception. This is a possibility that you will have to weigh in your own mind, if in fact you want children, or if you are planning on children at a later date, or are concerned that you may conceive unexpectedly. Only you can make the decision to run that risk. We would have to say that it is, medically speaking, just good sense not to run that risk if you want children and do not wish to expose the unborn child to risk, however small, and so recommend that you counsel with your family doctor and advise us of your wishes to transfer.

I'm here to answer any medical questions you may have. Any questions you may have about job change or transfer now or at a later date should be taken up with the Personnel Manager."

III. Summary Statement of Risks for Women Working in Lead Exposure

I have this day had the opportunity to listen to an explanation of the risks that any unborn child of mine might run by virtue of my exposure to lead in the course of my work at Globe-Union and to ask any questions I have about such risks.

I understand that the decision is mine to make, but the Company feels an obligation to inform me that there is a risk and to recommend from a medical point of view, that if I wish to have children that the risk is high enough to the unborn child to recommend that I *not* work at a job in lead exposure.

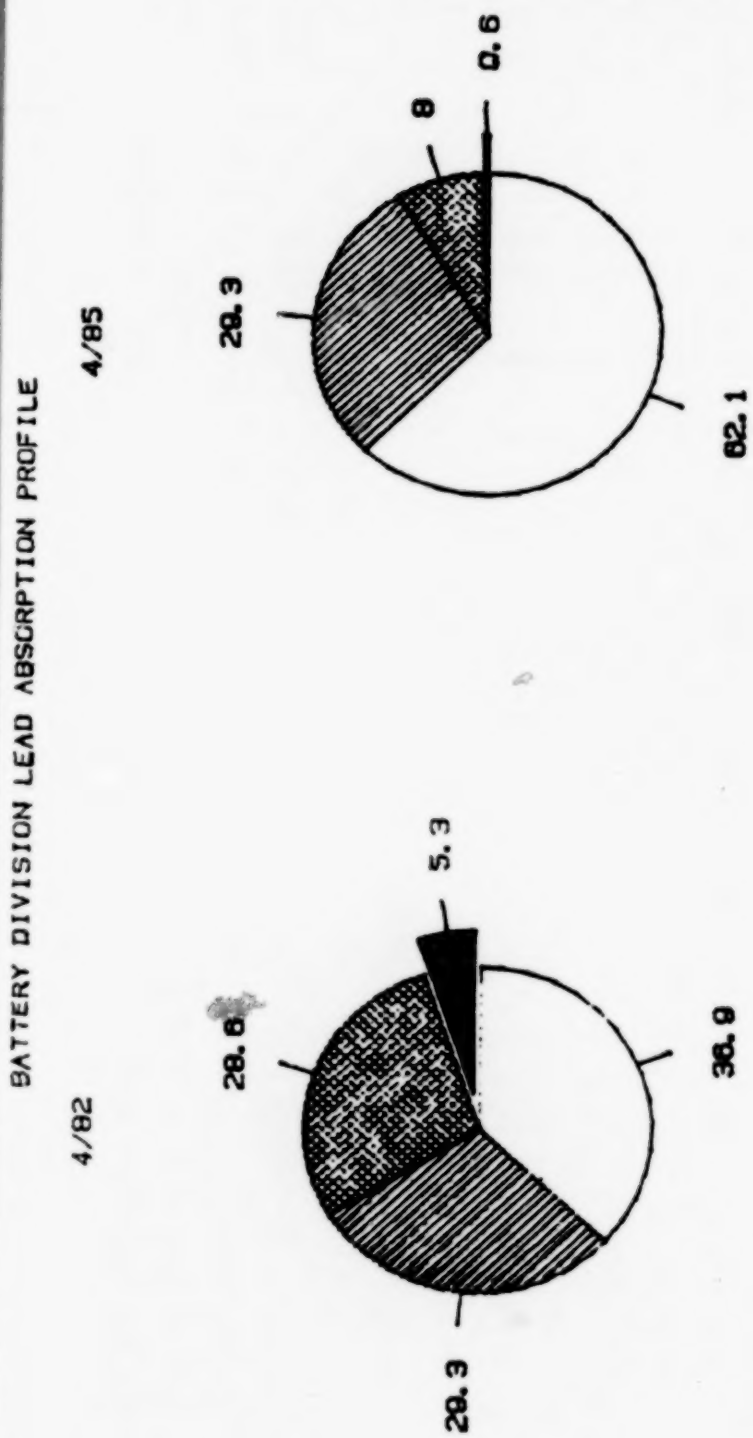
I have read and understand the above statement.

_____

Witness (interviewer) _____

Date _____

(Beaudoin Aff., Ex. L)



(Beaudoin Aff., Ex. M)

JOHNSON CONTROLS, INC.—BATTERY DIVISION

BLOOD LEAD PROFILE

Blood Lead Range, ug/100 ml	Percentage of the Manufacturing Workforce			OSHA Projection
	4/30/82	4/30/83	4/30/84	4/30/85
> 60 ug/100 ml	0.4	.07	.09	.02	.05
50-59 ug/100 ml	4.9	1.6	1.3	.62	5.5
40-49 ug/100 ml	28.6	12.1	9.3	8.0	23.3
30-39 ug/100 ml	29.3	31.8	28.7	29.3	
20-29 ug/100 ml	24.2	30.9	32.9	32.7	
< 20 ug/100 ml	12.7	23.4	27.7	29.4	
Total < 40 ug/100 ml	66.2	86.1	89.3	91.4	70.1
Total ≧ 40 ug/100 ml	33.9	13.8	10.7	8.6	29.3

* OSHA projection assumes compliance with 50 ug/m³ air standard (40 CFR 52963).

[EXCERPTS OF FISHBURN TESTIMONY]

(First Aff. of Jaspan, Ex. A)

[11] Q How does lead enter the body?

A Lead—inorganic lead enters the body by primarily inhaling air contaminated with metal oxides, or metal compounds of lead, as well as by ingesting it, which you can do on food or contaminated fingers, by contaminating food. It is then absorbed through the gut, a small amount.

Q How is the lead exposure of an individual measured?

A If you're speaking of lead exposure of a worker, the exposure is—is measured by monitoring the air, taking breathing zone samples from the individual worker on the job. If you're speaking of monitoring the worker in exposure you're doing this with blood-leads. And in addition to this we monitor the effect of the lead on the metabolism of hemoglobin, which is in the red blood cell.

Q What is, you say—what is a blood-lead?

A A blood-lead is a measure of the amount of lead that is present in the circulation of which we draw venous blood. [12] It's a measurement of recent past exposure.

Q What were the other measurements you've indicated?

A The other measurements that we monitor routinely for lead effect is hemoglobin, and the protoporphyrin, for it's the earliest easy thing that we have to measure to tell us the unwanted or adverse effect or interference of lead with making hemoglobin. If it proceeds far enough the reason we do hemoglobin is, one, make sure we do not have people who are severely anemic in lead, and that we do not have people who become anemic because of the effect of lead, and interfering with the production of hemoglobin.

* * * *

[13] Q What is the difference between measurement of the protoporphyrin or the hemoglobin as opposed to—compared to the blood-lead, are they the same thing or different things?

A We are measuring only the amount of lead that's in circulation when the blood-lead is measured, and what we're measuring for with the other test is what effect is it having on the individual, so that we're more concerned about protecting the individual against the unwanted effects regardless of the blood-lead.

Q Is there a correlation between the amount of lead in the system and the effects of lead?

A Well, there isn't a direct correlation between the lead and the effect, but the correlation is a population, the more lead you have in the body the more unwanted effect or poisoning you'll have in that population. So that what we're really monitoring is the more sensitive individuals that are responding in an unwanted way to the interference of lead on their body function.

Q So I understand, the blood-lead is simply measuring the amount that's present?

A That's correct.

Q And the protoporphyrin and the hemoglobin measures are measuring the actual effects of that lead?

A Yes.

[14] Q And the more lead the more likely there will be an effect?

A Yes.

Q Now, what are the dangers of lead to children? Are they any different than the dangers to adults?

A The dangers to children, the systems affected, the blood system in terms of making hemoglobin, is affected, as well as the central nervous system and the kidneys. And the difference in children is that those is much less. And the difference is that if they ingest lead they can be poisoned immediately in the sense that there is no apparent barrier between the brain and the blood, which is present in the adult, and can cause convulsions and, therefore, central nervous system damage much more severely than in adults.

The doses that it takes to do this is very much less than in adults.

Q What is this barrier that you're referring to? Would you elaborate on that a bit?

A It's the blood, there are certain things apparently during certain periods of the maturing of tissues that if you give a person, say for instance, penicillin for treating meningitis, or infection of the brain covering, the individual will not have that present in the fluids and the brain. And you say that not getting it there, [15] the blood brain barrier, the material does not pass readily from the bloodstream into the brain fluids.

Q That's called the—

A It's a blood. If you have a—you want to say there's an air lung barrier, for instance, you've got the circulation in your lung picking up oxygen, you inhale a dust, particularly doesn't enter the blood, if you inhale a gas it will enter the blood. So that the barrier of transmitting the chemical or molecule across the membrane of the blood into the fluid of the brain exists so that you don't find a concentration very great in the brain tissue or the brain fluids.

Q Now, this blood brain barrier that you referred to, does it exist in adults?

A It exists apparently in adults because of the lack of evidence of central nervous system damage in poisoned individuals who have anemia, or peripheral neuropathy problems. There's very little occurrence that the doses that we have in this country of central nervous system in the adult, and when you measure the fluids you do not find in most of the individuals that we've seen in hospitals, a significant amount of lead in the spinal fluid.

Q What about with the child, does the child have this blood brain barrier?

[16] A If a child who's under two years of age ingests just lead chip paint off of a windowsill or painted surface, a few chips in the stomach—and these sometimes

can be seen on x-ray—can cause a child to have enough lead in the central nervous system to cause convulsions, and if the dose is great enough, death.

Q How does that lead get into the central nervous system?

A It's very readily mobilized from the gut of the child into the bloodstream. Much like the inhaled soluable lead is mobilized from the deposition on the lung tissue into the blood. They're probably some enzymes and membrane transport systems that are different in children than in adults.

Q Well, it goes from the blood to where? The lead in the child.

A The blood, it goes—the blood circulating around the gut picks up the lead and then is carried to the brain in the blood.

Q Why doesn't that happen with the adult?

A Because the circulation presents the lead to the brain, but it doesn't cross into the tissue or fluid of the brain as readily as in the child.

Q When does this blood brain barrier develop in an individual?

A By the time the child is—they're more sensitive under [17] the age of two to ingesting lead and having severe poisoning from lead. By the time they're approximately five years old they've lost his sensitivity by presenting as a convulsive disorder if they're poisoned and begin to act as an adult with the same problems as the adult, and they do not mobilize as much lead from the gut, that drops off also.

Q What are the dangers of lead to an unborn fetus?

A They're the same as to the child, it is more—much more sensitive as a differentiating tissue, after the approximately second week or fourteenth day, when the fetus begins to get its blood from the mother, the central nervous system is one of the first systems that develops in the young developing child. And as in the—the child after birth, that is the most sensitive system, and that's the first to be affected.

Q What system?

A The central nervous system.

* * * *

[23] Q How do you measure the blood-lead of a fetus?

A You only can indirectly measure it through the mother's blood.

Q What's the relationship of the mother's blood-lead level to the fetus's blood-lead level?

A The blood-lead level in the mother is the same as in the child. There's no apparent barrier to crossing the placenta membrane into the cord of the baby and mother's. Nutrients get across into the—supplied to the developing fetus or baby in that manner. And the same amount of lead that is presented to the placenta by the mother's [24] blood apparently is the same for children and has been measured at time of birth by taking samples of cord blood.

Q As I understood your testimony with the adult you measure not only blood-lead level, which is the amount of lead, but also the effects of lead through the protoporphyrin?

A Yes.

Q Do you take similar studies—or can you take similar studies with the fetus?

A No, the fetus has a separate circulation, and their response to a toxic is individual. And, well, you could take samples surgically, but it isn't something that you would do to retain that. There's no way to sample the child's blood except by invasion of the uterus and the amniotic sac surgically.

Q Well, if I understand you the blood-lead level of the—of the mother is—the blood-lead level of the fetus is presumed to be the same as the blood-lead level of the mother?

A It is apparently the same by studies having been done on the fetuses of animals and cord blood in mothers, it's very close to being the same.

Q Why is the protoporphyrin measure of the mother also not the same as the child's?

A Because the effect of the lead on the fetus is to a new [25] individual. And the protoporphyrin is a measure of the mother's making red blood cells, whereas the protoporphyrin that is circulating in the developing fetus is manufactured in the same way as it would be in the mother, in the tissues that are forming red blood cells. And that is the interference in the fetus in the—by lead, with making red blood cells.

Q Is it possible that the mother has a certain blood-lead level showing no effects, or minimal effects, and the fetus has that same blood-lead level showing significant effects?

A Yes.

Q Why is that?

A For the simply reason that the mother may have no measurable toxic response to the lead. And this has been documented on individual cases where the person has a child who is born with lead poisoning, and has been treated with lead, for lead poisoning at the time of birth. And the response of the child is to the lead that was presented to him, and if it's in the range of—of above that which it responds to, 30 micrograms, or 25 micrograms, then it will be a poison at the time that it was exposed.

Q If an individual woman became pregnant and then removed herself from any excessive exposure would she be able, in that way, to protect the health of her fetus from the [26] dangers of lead exposure?

A If she is—has a certain level of circulation of blood that would be of harmful level to the fetus it would not decrease to not in a—in a specific amount of time. It may take several months to decrease to a reasonable level where there may not be any risk, so there is a risk, if you have a circulating lead that is of a danger to a child, namely, leads in the range of 30 micrograms.

* * * *

[28] Q Are you familiar with the fetal protection policy that is in effect at the Battery Division?

A Yes.

Q Did you play a role in it's adoption?

A Yes.

Q What was that role?

A The emphasis to put it in affect, it was a—a concern [29] had about exposing women to lead, and have been since 1971. And the policy to protect the fetus. I had probably the push to the Division to get it done.

Q In your judgment is that—in your opinion is that policy necessary from a medical point of view to protect the health of the unborn fetus?

A Absolutely.

Q Do you believe that the biological monitoring and other measures currently in effect in the Battery Division provide sufficient protection for the health of the male employees and those female employees who are not fertile?

A Yes.

Q Now, those provisions, as I understand it, generally the fetal protection policy, would preclude, generally, a woman that is capable of bearing children from working in an area where her blood-leads are likely to rise above 30?

A That's correct.

Q Why do you think that is necessary?

A For the simple reason that one, you do not always know when you're pregnant, and the other problem that we have in an average manufacturing facility is that conditions change so quickly, that [illegible] can have an overexposure which you may not dete[illegible] until it shows up in the circulating blood two to eight weeks later. So that if you [30] —if you have a major change in exposure that you're not aware of you cannot always see it or even measure it because of the circumstances.

Q Why would you find that the prior policy of allowing women to choose to work in high lead-levels unacceptable from a medical point of view?

A In my opinion it doesn't protect the child from overexposure to lead. Employees do become pregnant who have higher lead absorption than is reasonable.

Q In adults with—an individual with blood-lead levels of 50 micrograms and no other indication of lead effect, including the biological monitoring that exists in the Battery Division, is that individual—do you—is that individual safe, in your judgment?

A Yes, that individual would be safe.

Q A fetus who had a blood—whose mother's blood-lead level was 30, would that individual be safe, in your medical judgment?

A I would be concerned about the fetus.

Q Why are you willing to let adults work at 50 and the fetus at 30?

A There's no measure that we can measure and protect the unwanted effect of the lead on a central nervous system of that developing fetus. And the time you do measure those effects it's sometime after it has occurred.

[31] Q Nowhere in your testimony have you measured dangers to—or potential danger of lead to the male reproductive system. Is there any evidence that at some level or another there is danger to the male reproductive system?

A The only thing that has been studied is some effect on the mobility and the—the damage to the sperm, and this has been reported in the literature.

Q Now, the levels at which that—that damage or risk would arise for the male reproductive system, are they any less than the levels at which risk is generated for the other body systems and tissues which you testified were caused--were in danger from lead exposure?

A I don't think so. I think that the measures that we have for early problems that occur in biological systems such as enzymes or—or the effect of lead on making

red blood cells and hemoglobin in the red blood cells occurs much earlier than this. And in some individuals this is apparent at very low levels.

And the only thing on the germinal cells that has been documented is just a—the shape of it, or the—the motility of it. And it has occurred in the ranges that have been set of 40 to 50 for the adult working in lead.

Q If you had an adult employee working in lead with a blood-lead level of 49 and no indications of lead effect would [32] you feel it necessary to remove him from that environment if he indicated to you that he was about to have a family?

A If there were no other effects, no.

Q If you had a woman working in a lead environment with an exposure of 32 micrograms blood-lead would you give any direction if she indicated that she was about to have a family?

A I would, I would advise her to get out of exposure and allow her lead to decrease before she becomes pregnant.

Q You mentioned before that those studies that exist concerning the effect on the male reproductive system of lead exposure mentioned motility, is that what your testimony was?

A Motility.

Q Motility. What does that mean?

A The ability of the sperm to travel in fluid, it has an--an ability to—to propel itself with what they call a tail on the sperm and the ability of the sperm to travel through fluid is its motility.

Q Is that a temporary condition or a permanent condition?

A Well, any of the conditions that you affect the—the shape or the motility of the sperm where you overexpose is just like with the blood, if you reduce the—the effect it is a temporary effect.

Q In your medical judgment is there any reason to provide [33] greater protection or less exposure for the fertile male than for the unfertile male?

A No.

Q In your medical judgment is the danger to the male reproductive system any greater at lower levels than danger to the other systems in the adult male?

A No, I think the nervous system and probably some of the effects on the renal system is as great or greater than is on the germinal cells of the—either the adult male or female.

Q You say germinal cells, you're talking about reproductive system?

A Yes.

Q In your medical judgment is there any basis to provide greater protection to the fertile male than to the unfertile female?

A I think they're equal.

Q Why, in your medical judgment, is this the fertile female that needs the extra protection?

A The only reason for that is the sensitivity of the differentiating nervous tissue in the fetus, and we cannot protect the fetus when it's overexposed to lead from the mother's blood.

Q Going back to one point, Dr. Fishburn, on the studies that have shown some danger or effects of lead on the [34] male reproductive system, talk in terms of motility and what are the consequences of that, of decreased motility?

A Well, if anything, there was no follow-up study that you might lower the chances of the spouse becoming pregnant under those circumstances, but there's no data that I've read in the literature where the birth rate has been decreased in workers in this country as a result of lead exposure.

Q That would be a temporary condition, if at all?

A If at all.

Q It's just a matter of whether the spouse would become pregnant, not the nature of the pregnancy?

A That's correct.

Q Again, if you had a male with blood-leads in the forties, or say 50, and no other indication of lead effect based upon the other measurements used in the Battery Division, would you be concerned for the health of that individual's future offspring?

A If there was no effect I would not have any concern.

Q You're saying effect, based—

A Other measurements, I would not have any concern, no.

* * * *

[50] Q Globe Union has been in the past, hiring female employees to work in the lead areas; right?

A I have noted that to Globe Union the first time that I saw females in lead exposure in 1970—'71, and have recommended against this, since I first knew about it.

* * * *

Q You don't know of any fetal protection program prior to 1983; do you?

A Yes.

Q What was that?

A The previous physician, Dr. Bellmap, who's been with [51] Globe Union, would not have placed women in lead, and it wasn't until the standard for EEO that this became a problem.

Q The standard for what?

A Equal Employment Opportunity, and government contracts where you could not distinguish because of sex. It becomes a problem in industry who did not have a normal occupational medicine program.

Q You mean once the EEO got into the picture then females had to be employed and treated the same as males?

A Yes.

* * * *

[59] Q Now, if a male employee is exposed to lead and doesn't observe the necessary hygienic types of measures to cut down the ingestion of lead, and then he goes home, can that lead be absorbed by his wife?

A If any employee carries lead on their body or clothes home, other members of the family can ingest it or inhale it. Gets into the dust, in the environment in the home that they don't have filters on cleaning equipment to filter it out.

Q So if I understand it then, the wife of that employee has an exposure to her system and her fetuses?

A That's correct.

Q And that would be true even though that female didn't work for Globe Union?

A Yes.

* * * *

[60] A I don't know what the risk reduction would be in this [61] small population, but there has been a study recently published in the Journal of American Medical Association by Needleman, malformations of several thousand births in measuring cord blood of the newborn, and the various hospitals where they studied this in the East, and they were not workers working in lead exposure.

And the levels of the cord blood were in the range of—the highest reported I think was in the range of 30, 24 was a group, micrograms per hundred ml's of cord blood. And their report was based on malformations in several thousand, I think 5,000 plus births, so that as far as our data would be concerned in a small number of people I don't know how you would evaluate that kind of a risk.

I know that in my opinion if you were going to expose these people in a—to lead oxide dust and/or fume the conditions that we have at Keefe, there is a large risk of having problems with children.

* * * *

[63] Q Okay. Now, if the Company invests more money into eliminating the lead levels in the air they can reduce the risk to all employees; could they not?

[64] A Of course.

* * * *

[66] Q To your knowledge has there been any female employees employed in the Battery Division of Globe Union?

A I think those people who are not reproductive could work in lead exposures the same as in the adult male. They're both equally subject to the same responses of lead biologically. So that there is no distinction between the adult male and female except that when she carries the child, a fetus is then exposed to the same level of blood lead that the mother has, and the fetus is the problem and not the mother.

Q Okay. Now, were you consulted about how a determination should be made as to whether a female is or is not childbearing capability?

A I consult the patient for that information.

Q I'm talking about with Globe Union.

A I wouldn't consult Globe Union on that issue, if I'm taking a history examining a female.

Q Well, under the fetal protection policy if a woman is 60 years old, employed by Globe Union, should the fetal protection policy impact on that female employee?

A If she is ovulating I think it should impact on that employee. It's up to the employee in her own situation working with the doctor who established whether or not she is ovulating and that's pretty easily documented.

[67] Q But what if the Company just says, all women up to the—to age 65 are barred, is that a fair application of a fetal protection policy?

A Well, I don't think that it says that. I think that it says that if you can't reproduce at 30 or 60, and you document that, that's acceptable.

Q How has that been documented, to your knowledge?

A By medical records, by medical history. If I take your history and examine you you have another history that you've been working with your doctor. And you either know or do not know for a fact what's going on with your health. And if it isn't we ask for the employee to see the doctor and get some help on the knowledge of their present condition.

* * * *

[73] Q I'm asking for your opinion, in your professional judgment, has implementation of the fetal protection policy [74] reduced the risk of danger to the fetus—unborn fetus of female employees?

A Yes.

Q Where the mother has blood-leads greater than 30 is the risk to the—in your opinion—is the risk to the fetus significant?

A It's significant, yes.

* * * *

[77] Q Now, if I understand your concern on the biological standard was that you don't believe you can measure the health of an individual solely on the basis of the single blood-lead level?

A That's one. And besides, if you wait to measure an exposure effect on an individual this is not a preventive program. The nature of industrial hygiene is controlling of exposure. The nature of safety is controlling the risk of injury. And if you do that then what the occupational health program is for is the medical monitoring, says, yes, you did the job and people are healthy. That's the basis of preventive occupational medicine.

Q If your concern—well, let me go on back on that. You're saying that just using biological monitoring is too late?

A You've already been exposed if you measure in the blood. And if it's carbon monoxide and you've got too much you're dead.

Q If you have this concern of using—even using biological standards of a single blood-lead level why is that the criteria that is used for the fetal protection policy?

A Because there you're protecting a specific system, namely, [78] the central nervous system, of a developing child, or after birth the young child, which is directly affected by the poison. And if you increase the level of exposure to that system you're going to have a certain number of people affected later in life, or immediately, which is learning and behavioral difficulty.

And that is the critical issue in terms of childhood lead poisoning, protecting them from being exposed, and in the cases of the general environment, protecting the families in the sense of the fetus from the exposures.

Q And the blood-lead level in that instance is directly connected with the damage as opposed to the other issues what you were talking about in your testimony?

A Because there is apparently no barrier to the lead entering the tissues or the fluids of the brain, particularly up until about five years of age. And it drops off from two to five, there is less difficulty. But from two to birth and before from the fetus it is particularly sensitive to the effect—adverse effect of lead, and there is no—whatever is is in the blood of the mother or whatever is in the blood of the child, affects the brain.

Q Directly?

A Directly.

[79] Q If I understand correctly, in an adult the blood-lead level, because of this blood brain barrier, will have a different impact on different individuals?

A That's correct.

Q Or may not have any impact on them?

A It may not have any impact on them.

Q And in the child this barrier doesn't exist between the blood and the brain?

A That's correct.

Q Now, even if you wanted to, on a regular basis, use measures in the fetus beyond the blood-lead level, can

you, on a routine basis, measure the ZPP, or the zinc protoporphyrin of the fetus?

A No.

Q Can you do a physical examination of the fetus?

A No.

Q Can you measure hemoglobin in the fetus?

A The only way you can do any measurements on the fetus is by invading—by invading the uterus and the amniotic sac, it's a surgical procedure.

Q Without using surgery could you perform any of the measurements that you do on the adult employee at the Company other than the measurement of the blood-lead level of the fetus?

A That's all we could do.

[80] Q That's the only criterian you have available?

A Yes.

* * * *

[81] Q Now, just so the record is clear, on the adult of the employee, other than the blood-lead what actual measures do you take, or how do you evaluate the health of the employee concerning lead, other than the blood-lead?

A We monitor the effect of lead on heme-synthesis by doing protoporphyrines.

Q Is that what's worded as ZPP?

[82] A That's ZPP. If we do the ZPP on the hemato-flourometer in the plant and we're not satisfied we'll ask for a wet chemical procedure called free erythrocyte from the laboratory. And it's a doublecheck on our levels of protoporphyrin. We also do CBC, a complete blood count involving all the cellular elements of the blood and biochemistries, which monitor the functions of other organ functions, such as kidney and liver function, and the biochemistry, really, of the blood.

Q What else do you do in evaluating the health of the employee with respect to lead exposure?

A We look at the individual from an examination point of view, and the history—medical history, as well

as we look at the exposure history of that employee. On occasion if there's some question we may go out and even evaluate the job.

* * * *

[86] Q You were asked questions concerning the possibility of an employee carrying lead home and affecting the family. In what way could lead be carried home?

A If they do not clean and shower, if they're in a dusty or dirty area if they do not change their clothes, if they do not change their shoes. They can carry lead home in their clothing and on their shoes and on their body.

Q Now, if—are there measures in place at the Keefe plant to prevent that from happening?

A Yes.

Q What type of measures?

A They have clothing and shoes and shower facilities. They have—if you have long hair you can get nets for your hair, in addition to the showers and gloves and the whole gamut of protective clothing and protective equipment so that you can leave the lead in the plant.

Q If an employee does all of these things and takes no lead home on his clothes, on his body, in his hair, or on her clothes, on her body, on her hair, but had been exposed to lead so that that individual has relatively high blood-lead levels, is there any direct risk to the rest of the family?

[87] A No.

Q When you're talking about carrying lead home you're talking about carrying it on the surface?

A On the surface, yes.

* * * *

[91] Q You've touched on something there. If I understand it, you would go more to the individual now, even if he had—was in an air exposure of a hundred, that wouldn't necessarily disqualify him from anything, he may not show any effects of even high blood-lead levels?

A That's correct.

Q And also, even if that certain individual had blood-lead levels above 50 he may not even be affected by that because of other characteristics of that individual?

A That's correct.

Q Now, the fetal protection policy just is a flat policy applicable to all that's not consistent, is it, with the individual approach?

A No, it's consistent with the individual approach to the fetus, where we know that—that at a specific age and up until that age you have brain damage if you're exposed to a blood-lead of a certain level, or you have the absorption of that level into the tissues. And above this the children are affected by central nervous system damage, and that's a developed mental thing and it has nothing to do with the adult lead poisonins situation.

* * * *

[EXCERPTS OF CHISOLM DEPOSITION]

(Second Aff. of Jaspan, Ex. A)

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[15] whatever that level may be at any given time, the real impact of, say, a woman of child bearing capability who has been exposed to a certain level of lead is in some kind of adverse affect on her physical or mental capacity, is it not?

A The affect I think is on the fetus. I don't know that there is any real effect on the woman at that level, but it is on the unborn child.

Q At the level of 30 micrograms?

A Well, the risk increases. What you get is a dose dependent increasing frequency of unwanted effects. It is an affect on the fetus that we are concerned about, primarily on the latter growth spurt of the brain, which occurs in the latter half of the last trimester of pregnancy. That is what the concern is about.

Q I see. In evaluating this effect, you would look to see, for a given level of exposure of the mother to lead, you would look to see—to measure its effect, you would look to see certain aspects or certain affects on the fetus or on the offspring after it was born to determine what the effects were. What effects would you be seeing in these offspring?

A Well, I think that the recent paper by Bellinger is very much to the point, and they divided the women into three [16] groups: those who had mean blood leads of less than—those who had blood leads less than 3 micrograms per decaliter, 6 to 7 micrograms per decaliter, and equal to or greater than 10 micrograms per decaliter. And what they have used, what they have used is the Bailey mentla developmental index. That I would say is the most widely used scale of infant development for the first two years of life. Other scales come along later.

What we have found, what in effect the group in Cincinnati has also found is that as the blood lead concen-

tration increases, the cognitive development of the infant field is delayed. The psychomotor level index, which is the time at which the baby sits, stands, walks, and so forth, that is not affected, but rather it is the cognitive development. And they show in this study that there is a highly significant relationship between the cord blood test, that's the biggest blood lead at the time of birth, and his mental developmental index at six and twelve months of age. And that it is not related to the current blood lead. That is, the blood lead taken at six months of age. In fact, the blood leads that an infant has at birth are not correlated at all with subsequent blood lead levels. And I think that applies to this Cincinnati [17] study.

They carried this out, now, to two years of age, and they still find, although not at 18 months, they still find a significant correlation relationship between the mental developmental index of 24 months of age and the cord blood lead, and these—the analysis has been adjusted statistically to account for compounding factors.

I would consider this highly significant. Whether we are dealing with a delay in development or whether these are permanent effects, we will probably have to wait until these children are six to eight years of age.

Q At this point, at least—

A But it is perfectly clear that there is at least a delay. And from these data, you obviously can't tell whether it is permanet. There are some animal data that suggests that you can get a dealy. There are other animal data, particularly monkeys, that would suggest that very early low-level lead exposure is in fact associated with permanent impairment, really in learning ability and in responding under stress.

Q What animal study is it that involves the monkeys?

A The ones I am thinking about are those by Deborah Brice. They are published in Toxicology, Applied Pharmacology. [18] But she has been following monkeys out to eight years of blood that were dosed in the first 200 days of life, and I would say that is a fairly recent

publication, but they suggested that the effects may be permanent.

Q Are these at levels comparable to the levels we are talking about?

A Well, the group I am thinking of are infant monkeys that never had blood leads above 25 micrograms per decaliter. But I think these human data are very disturbing; it is not only the Bellinger study in Boston, but also studies in Cincinnati—I presume you talked to Dr. Hammond about that, quite recently in relation to this matter. And the studies are quite, quite consistent.

There is also an effect apparently on birth weight and length of gestation, an inverse relationship. As the blood lead level goes higher, the lower the birth weight, the shorter the gestation time.

Q Is there any explanation offered in any of these studies as to how the lead exposure operates to cause a lower birth weight?

A I don't know of specific studies, but lead certainly does interfere with—it does bind the DNA, it can affect [19] that; it affects energy, all the interest in impairment of hemosynthesis is related to energy production, and in past experiments in the brain, you can show that oxydative phosphorylation, which is efficiency of energy use, is impaired.

Lead binds to and is retained by an infant brain, that is the difference between an infant brain and an adult brain.

So that the basic level mechanisms are known that would explain this.

And I think it is reasonable in relation to the build-up of lead in the fetus. There is only one study that I know of on that issue, but abortuses, stillbirths, miscarriages have been analyzed for lead by Barltrop. They show that the lead builds up really in the last trimester of pregnancy, so that the tissues of stillborns who are at term are comparable to those found in the nonpregnant adult female. The real build-up comes toward the end.

Q Toward the end?

A The latter half of the pregnancy.

Q You emphasize a certain concern for exposure, lead exposure, in the latter half of pregnancy. Does that suggest that a woman who becomes pregnant, who maybe has 25 or 30 [20] microgram blood lead level at the time that she first becomes pregnant but is removed from that lead environment immediately and moved into an environment with a blood lead—I mean, an air lead level or an ambient lead level where the population is exposed to, which is much less lower than the industrial levels—I am not sure what that would be—maybe 9 to 10 micrograms per cubic meter range, something like that—would she then be expecting to have the same kind of adverse effects on her offspring as you have just described?

A Well, I think the answer to that is a little complicated. In the first place, it depends upon how long she has been working, because lead builds up not only in the blood and soft tissues, but it is stored in bones. And it is sort of a safety valve for us, if you will, in an effort to keep our soft tissue levels low and uniform.

Well, even when someone stops exposure, while you may be getting a lower input from the air, food, or whatever, you are going to have a turnover of lead in bone and you are going to have lead feeding back out from the bone.

The pertinent experiments on this are really those of Dr. Kehoe a number of years ago, who followed men—didn't follow women, but followed men by feeding them extra [21] lead. He then plotted how long it took for their blood leads to go down. And the rule of thumb was that it took at least twice as long for it to go down as it did for it to go up.

A better estimate would be two to three times as long.

So if this hypothetical woman has been employed for any length of time, her blood lead is not going to go down that fast. Not only that, but there is a real concern—a woman who is pregnant is at risk in decalcifying her bone. There is also real concern for mobilizing the lead in the bone.

So I don't think that you can say if she stops shortly, well, promptly, she would be out of the woods.

There is a study, a report in this paper by Ronald Lane about an episode that occurred in the Second World War in Britain, and one of the points he made was that they removed the women from work as soon as it was known they were pregnant, and one—he doesn't say specifically, but one presumes that two, three, or four months, something of that order—even so, there are an excessive number of stillbirths.

Now, these were women, the didn't do any blood leads on the women, didn't even do urine leads. But if you take the air leads and the urine leads on the men, one could estimate that they probably had blood leads of, say, 50, 60, or 70 [22] micrograms percent.

So the point is here—now, they had much higher levels than you are talking about, but it takes awhile for it to disappear, and there is no drug that I know of, no chelating agent that could be given to accelerate this that would be safe.

The most common drug used is calcium disodium EDTA. This drug is clearly teratogenic. It is teratogenic because it removes a lot of zinc. That has been done in animals.

If you give zinc in EDTA, you don't get any abnormal offspring in the dogs I am thinking about. If you give calcium EDTA, you do get congenital malformations throughout the pregnancy.

So there would be no safe way to treat the person.

* * * *

[25] Q Right. Given that there is a dose-response relationship, if we hypothesize a woman who has previously not been employed in any kind of increased lead environment but, say, was at the threshold community median level, and subsequently became employed in an area in which there were higher levels of lead in the air, and she worked there for, let's assume, a period of two months and her blood lead level increased to let's take, for example, 25 micrograms per decaliter of lead, based

upon the information and the studies that suggest that it takes two to three times as long to come down, for the blood level to reduce itself to its former level, would you still anticipate that had that person become pregnant at the time that they had achieved this 25 microgram blood lead level, that they would [26] have offspring with measurable abnormalities, central nervous system damage?

A Well, in the first place, we are dealing with a risk factor.

Q I see.

A We really can't say about individuals.

In the second place, the rate at which it falls may depend upon our past exposure.

Q I understand.

A And remember that the general population exposures in the past and fairly recent past have been higher than they are now. All of that is going to relate to the rate at which her blood lead declines.

But if you assume that she conceived, went to work for two months and went up to a blood level of 25, and then it is going to be four to six months she will be practically through her pregnancy.

So, I don't think any specific answer can be given to your question. I would be rather doubtful, though, it might be back down below 10 by the onset of the third trimester pregnancy.

I really couldn't answer that question. It is a [27] hypothetical question.

Q I understand.

Could you say that it is possible that there would be no observable damage to the central nervous system under that set of circumstances we just described?

A What do you mean by "observable"?

Q You earlier described some measurable adverse affect on the central nervous system as a result of fetal exposure.

A I wouldn't anticipate any, obviously, anatomical malformations whatsoever, although I know that Needleman has reported minor malformations of no consequence.

What we are worried about are very subtle things, the ability to really affect learning ability. And so far as impairing the child's progress they really aren't evident until he gets into school. He discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child perhaps toward the end of the first grade, particularly in the second grade.

Q Given the example that we just talked about, are you [28] saying that you can't predict whether there will be an adverse affect or not?

A Well, I would have to put it this way I think, the risk that there might be an adverse affect would be greater than if a blood lead had never been above 10.

Q Could you also say, based on what we just talked about, that the adverse affect of the offspring born to that woman who had only been exposed for two months, compared to the offspring of a woman who had been exposed throughout her pregnancy, through the full nine months, would in fact be—the risk of adverse damage to the central nervous system would be lower for the person who had only been exposed to two months as opposed to that person that had been exposed for the full nine months?

A Well, in theory, I guess the risk would be less, but I don't see how you would ever say about individuals.

You would have to have very large groups, and you might find that the frequency was somewhat less under those circumstances.

Q Doctor, in your review of the literature on the toxicology and based on your own experiences, is there any suggestion that the exposure of men can alter the genetic [29] characteristics of their sperm, such that a resulting fertilization of an ovum by that sperm could result in a child with some observable abnormality?

A I don't think that there is any evidence to support that.

Q In your opinion is it possible that a man exposed to lead who acquires, let's say, a 30 to 40 microgram blood lead level could have an altered genetic characteristic of his sperm?

A I wouldn't know of any evidence in favor of that. Any animal data is generally at much higher doses that are not relevant to the human situation, and furthermore if you go back 100 years or so ago, one of the things that I think stands out fairly clearly in the old literature is that lead is not a teratogen. In other words, they never had anatomical malformations; those were never recognized. Increased rates of miscarriage and stillbirth were reported, and that, in fact, is what led a British Royal Commission in 1910 to recommend that henceforth women never be employed in the lead trades. And that was enforced by law in some countries.

Q You just made an observation that the animal studies which might suggest that there might be some genetically [30] altered—

A I think those were mostly in vitro studies, too.

I don't recall offhand any that—well, it has never really been possible to produce malformations in animals by oral feeding. The only one who has ever done it, or the only time it has ever been done is at very large doses by injection. And teratologists really would argue whether you are dealing with something genetic or whether you are simply dealing with direct damage or toxicity due to the overwhelming dose you have given him.

I say Goyer and Stowe did feed animals, but they fed them again quite high doses, and they could find that the offspring were smaller, that sort of thing, but again I don't know of any malformations. Any anatomical malformations I am talking about.

Q Certainly. Let me just ask you, what is your reason for saying that the animal studies do not have any relevancy to human circumstances?

A Well, now, I am not a reproductive biologist, but reproduction in rodents in particular is quite a different

proposition than that in man, for example. I don't think they are directly transferrable.

[31] Many of these studies have been done again at very high doses and lead is—actually not studies have been done, again, at very high doses, and lead is actually not studies to determine dose-response relationships as far as lead is concerned but to give a high enough dose to produce an effect, so that they could study the effect scientifically. In other words, the lead is an experimental tool on a number of these studies.

Q Does that mean that at least according to your understanding, that the affect of lead on the reproductive systems of animals, rats, and some other studies, is not transferrable to the information regarding humans?

A Not directly. Most of the animal studies are mechanistic. What you look for, they are trying to study mechanisms. And then if you will study rodents, you would go to another type of animal to see if the same mechanism is there.

But I can't say that they have any application to the very low level exposures. I think that the more human exposure data you have, the better off you are.

Q If I understand you correctly, then, you are saying that the way in which lead affects animals' reproductive systems, the mechanics of that affect are so different from the [32] mechanics of its affects on humans—

A From my reading—

Q —that you simply can't transfer the results or the conclusions from animals to humans?

A Directly.

Q Can you do it indirectly?

A Well, I think you would look, if you discover some mechanisms in animals, you might look—I think a reproductive biologist would look to see if you can find some kind of evidence of the same thing in humans. But it is certainly my understanding that the situation is different.

As I say, I am not a reproductive biologist, and not having done a study.

Q I understand.

Based upon your understanding, then, would you conclude that there is not evidence of spontaneous abortions or stillbirths where women, unexposed women have been made pregnant by exposed men?

A I don't think there is any evidence that exposure of the male per se has any affect on the offspring. A number of the older studies—we are dealing with cottage industries where both men and women are exposed, we also know that they [33] may have brought home lead containing dust and so exposed their wives in the home.

But I don't think we have any studies where it is male exposure per se that results in this, that results in ill effects on the offspring. And I think that all of the data would indicate that the women—you may have both exposed, quite true, but the women have to be exposed. Because, after all, the fetus is in the woman's body. And it is the transfer of the lead through her body across the placenta to the fetus that is what is having the direct effect.

* * * *

[37] In workers, we certainly are aware anecdotally of cases where children do develop high blood lead levels in relation to workmen bringing lead dust home.

There is a report by Baker in the New England Journal of Medicine—I think that might be almost ten years ago—in Memphis, Tennessee, where the workers in a battery plant were bringing dust home.

I have run into occasional cases in practice, there are some studies reported by, let's see, Dolcourt. They are mainly reported by Schroeder out of Chapel Hill. There is a mixture, but really what got them started was the study of children, screening of children who were found to have increased blood lead concentrations and further examination showed that their mothers worked in a battery plant and brought the dust home. So there are—and I think there are other episodes of such things, but I don't know of any, other than the Schroeder study,

any study which has concentrated on this group; that is, the children of workers who brought lead dust into the [38] home.

Q If you can recall—

A And they are not large groups, so they don't have the statistical power of larger groups, such as those being studied here in Cincinnati and Boston.

Q What were the observed blood leads in the children that were measured in that study if you can recall?

A I think in the Baker study, in the Baker study there were three or four children who were symptomatic and had blood leads in excess of 80, and the report said that they found no other reason than the dust was brought home.

* * * *

[40] Q From your testimony here today, it can be concluded that in your opinion, lead does not have an adverse effect on the genetic characteristics of sperm?

A I don't think, in the human race there is no evidence for that, and there is a lot of experience up to—in the second half of the 19th century, anatomical malformations were not found. It seems to fit quite well with the work of Voltrop which indicates the transfer of lead across the placenta is something that occurs later.

If it were getting to the embryo during the period of organic genesis, you would expect, in significant quantities you would expect some anatomical malformations and the experience does not show anything.

Q You have earlier indicated that in your opinion, that is not teratogenic with respect to humans; is that correct?

A I am using it in a classical term.

Q When you say classical term, you mean—

[41] A Well, I mean anatomical, gross anatomical malformations.

Now, again, I am aware—

Q Physical observable?

A Yes. I mean, you are going to get congenital cardiac malformations or something that will be ultimately diagnosable.

Now, I am aware of these minor things that Needleman reported, perhaps the most common of which is inguinal hernias. But that can be looked at simply as a delay in the latter development. In other words, you are not talking about a malformed organ; you are talking about a development that is slower. The inguinal canal should be sealed up at birth. If it is not, it ought to be sealed up shortly thereafter. So I think he called that a mild malformation. I don't know that it really is.

Just like umbilical hernias can be delays in the closure of the umbilical ring. Many of those umbilical hernias in babies, they will heal by themselves. You don't have to do anything with them. If they are big, you may have to. But I am talking about significant anatomical malformations.

* * * *

[47] In 1985, the CDC said in order to provide a margin [48] of safety, they would lower the level to 25. And I am saying now that in light of these newer data, perhaps these procedures need to be reevaluated, reconsidered.

I am saying that 30 at the time it was issued would be generally—would represent the general consensus, but as we get newer information, we may have to modify this. But, on the other hand, I am not in industry, but I wouldn't see how you could try and maintain blood leads at 10 or less and be occupation exposed, which seems to me to say they shouldn't be occupied in the lead trade.

* * * *

[49] Q Doctor, have you had occasion or opportunity to actually read through the deposition of Anthony Scialli?

A I read quickly through this last night, around midnight.

Q Can you recall at this point any of the conclusions or testimony of Dr. Scialli?

A I think he is the one who was testifying to the effect that you couldn't make direct transfers from animal experiments.

* * * *

Now, I don't know whether he's the one that said that he thought that there might be some effects early in pregnancy. I would have to disagree with that.

* * * *

Q Excuse me. With respect to his conclusion that you [50] can't make a direct transfer of animal studies to human situations—

A Right.

Q —are you in agreement with that conclusion?

A Yes, and I think there probably is a consensus; I think there are other people who would agree with that. But I also told you that I am not a reproductive biologist.

* * * *

[51] A This is an abstract from a presentation by David Bellinger at the International Conference on Heavy Metals in the Environment, in Athens, Greece, in September 1985. And [52] it is entitled "A longitudinal study of the developmental toxicity of low level lead exposure in the prenatal and early postnatal years." And it carries this up to two years of age.

What they are showing—in other words, it carries this paper that was recently published covering the first year of life to two years of life, and it would indicate that a significant effect on the Bailey mental developmental index related to the cord blood lead obtained at birth on the infant; that that is still showing a significant affect out to two years of age. So it is an extension of this other study that I mentioned.

And thes, as he says, "Cord blood lead greater than 10 micrograms per decaliter but less than 25 micrograms per decaliter were consistently associated with

less favorable early mental development in our sample of low-risk infants."

So it appears to say that the affects that they observed in the first year of life are continuing on into the second year of life. And again, I think the important point about this is that these children would not be considered to be overexposed postnatally by current standards.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

AFFIDAVIT OF ANTHONY R. SCIALLI, M.D.

DISTRICT OF COLUMBIA) SS.

ANTHONY R. SCIALLI, M.D., being first duly sworn, on oath, deposes and states as follows:

1. I am a physician licensed to practice in the States of Maryland, California and Virginia and in the District of Columbia. I received my medical degree in 1975 from Albany Medical College. Attached hereto and incorporated by reference as Exhibit A is my curriculum vitae which lists, among other things, my educational background, professional experience, professional appointments and memberships, as well as a bibliography of my professional publications.

2. I am engaged in the clinical practice of obstetrics and gynecology.

3. In addition to my clinical practice, I am also Director of the Reproductive Toxicology Center located in Washington, D.C. The Center serves as a source of information on the potential reproductive toxicity of environmental and physical agents. I have done substantial research in the field of the toxic effects of lead exposure on humans, with particular emphasis on the effects of lead on reproductive health.

4. There is an ever growing body of medical literature which establishes that the central nervous systems of

young children can be permanently adversely affected by blood lead levels in excess of 25 micrograms per deciliter of whole blood. One of the leading reports in this area is the January 1985 Statement by the Centers for Disease Control of the U.S. Department of Health and Human Services, "Preventing Lead Poisoning in Young Children", which is attached hereto and incorporated by reference as Exhibit B. The Statement concludes that young children are considered to be lead intoxicated if their blood lead levels reach 25 micrograms.

5. In my medical opinion, because of the extremely rapid development of the central nervous system during gestation, the fetus may be even more sensitive to the toxic effects of lead than the young child. While the exact level at which there is no effect on the fetus is unknown, it can be stated with a high degree of certainty, based on current medical knowledge, that 25 micrograms is the highest possible acceptable level.

6. During pregnancy the mother's blood lead passes through the placenta to the fetus. Therefore, the fetus' blood lead level is approximately the same as that of the mother. Measuring the blood lead level of the mother is the only clinically acceptable method to estimate the blood lead of the fetus.

7. The potential damage to the central nervous system of the fetus from lead exposure includes intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities. It is my medical opinion that such damage may be permanent.

8. There are no studies that show that the exposure of the adult male to blood lead levels of up to 50 micrograms will result in any abnormality in the offspring. The medical studies generally conclude that the exposure of men to toxic substances analogous to lead does not result in an increase in adverse outcome in offspring. Further, the available medical evidence establishes that lead does not cause any change in the sperm that would

be expected to be transmitted to the offspring and result in an abnormality in the offspring. In my opinion, based on current medical knowledge, a man with a blood lead level of 50 micrograms is not expected to have an increased risk of fathering a child with any type of abnormality caused by his exposure to lead.

9. There are some studies that have been performed on rodents which show that lead exposure may cause reproductive toxicity in rodents. However, these studies cannot be extrapolated to humans. The reproductive system of the rodent, in terms of transmissible changes in offspring due to exposure to toxic substances, is simply not analogous to the human reproductive system, male or female. This is demonstrated by the fact that there are a large number of compounds other than lead which cause reproductive toxicity in rodents, but not in humans. A specific example is the drug Thalidomide which was used in the 1960's to treat pregnant women. This drug was given to mice and rats and did not cause any birth defects; however, the drug caused major limb defects in human offspring. Further, the tests in rodents which have concluded that lead caused chromosomal damage deal mainly with things such as a change in the shape of the sperm, which in rodents is a genetic factor. However, this cannot be extrapolated to humans because there is no evidence that sperm shape in humans is determined in the same way; rather, it is a particular feature of the rodent that sperm shape is determined by genetic factors.

10. Lead toxicity in an adult is, to a large extent, reversible or likely to be reversible. Further, lead exposure of 30 to 50 micrograms is not likely to produce any significant adverse effects in adults; however, at these levels there is a substantial risk of irreversible neurological damage to the fetus

11. Because of the special susceptibility of the fetus to lead and the fact that the fetus is exposed to the

same blood lead levels as the mother, it is my medical opinion that all women of reproductive potential should be removed from work areas where their blood lead levels may rise above the average level of nonexposed individuals in the community. I would include in this prohibition all women who have ovarian function or who have a genital tract which is open, whether or not they intend to bear children at a future date. This would include women who have no intention of bearing children, but who are still capable of bearing children, because there is no foolproof method of birth control and, therefore, there are many unplanned pregnancies. I would exclude from this medical prohibition only women who are menopausal or who have had a tubal ligation or hysterectomy.

12. In my opinion removing a woman from lead exposure only after she actually becomes pregnant is a medically unacceptable means of attempting to protect the fetus from the adverse effects of the mother's elevated blood lead. If a person has been exposed to lead for any length of time, the lead could remain in the body for months or years after removal from exposure. Therefore, during the nine months of gestation the fetus will be exposed to harmful levels of lead from the mother's blood despite removal of the mother, thus creating a significant risk that the child will be born with a neurologic injury.

13. This Affidavit is made and submitted in support of the Motion for Summary Judgment of Defendant Johnson Controls, Inc.

Dated this 31st day of July, 1986.

[Signatures Omitted in Printing]

* * * *

A STATEMENT BY THE CENTERS FOR DISEASE CONTROL—JANUARY 1985

(Scialli Aff., Ex. B)

PREVENTING LEAD POISONING IN YOUNG CHILDREN

U.S. Department of Health and Human Services
Public Health Service
Centers for Disease Control

[7]

OCCUPATIONAL SOURCES

Lead dust can cling to the skin, hair, shoes, clothing, and vehicles of workers, and lead can be carried from workplace to home in this way. In a study in Memphis, Tennessee, when a parent worked with lead, the amount of lead in the children's blood correlated with the concentration of lead in dust in their homes (Baker, Folland et al., 1977). Of 91 children tested, 38 (41.8%) had blood lead levels of 30 μg/dl or more, and 10 either had blood lead levels of 80 μg/dl or more or EP levels above 190 μg/dl.

Strict compliance with Occupational Safety and Health Administration (OSHA) standards is quite effective in decreasing this type of exposure. However, many occupational exposures to lead are not covered by the OSHA standards. Companies with fewer than 10 employees (cottage industries, "hobby" production of pottery and stained glasswork, and home manufacturing of bullets and fishing sinkers) are excluded from OSHA standards.

The OSHA standard for lead workers is a blood lead level of 40 μg/dl. In a pregnant woman, lead crosses the placenta, and lead concentrations in umbilical cord blood are nearly equal to those in maternal blood (Barltrop, 1966). Since the growing brain of the fetus is likely to be at least as sensitive to the neurologic effects of lead as

the brain of a young child, umbilical cord blood levels should be at least below 25 μg/dl. Therefore, the OSHA standard is probably not sufficiently strict to protect the fetus. Further study is needed to define acceptable lead levels among women of childbearing age.

* * * *

[20]

OCCUPATIONAL

Ideally, engineering features should prevent workers from being exposed to lead dust and vapors. When workers are exposed, compliance with Occupational Safety and Health Administration (OSHA) regulations appears to be effective in protecting them and in preventing them from transporting lead home to children. Under the OSHA lead standard, factories that use lead must provide workers with facilities for showering and changing [21] clothes and shoes before going home from work. This standard now applies only to industries covered by OSHA regulations. For the protection of children, it should be extended to all industries that use lead. The prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

AFFIDAVIT OF M. DONALD WHORTON, M.D., M.P.H.

M. DONALD WHORTON, M.D., M.P.H., being first duly sworn, on oath, deposes and states as follows:

1. I am a physician licensed to practice medicine in the State of California. I received my medical degree in 1968 from the University of New Mexico and my Masters of Public Health in environmental medicine in 1973 from Johns Hopkins University School of Hygiene and Public Health. Attached hereto and incorporated by reference as Exhibit A is my curriculum vitae which lists, among other things, my educational and professional background, board certifications, and professional affiliations and activities. It also includes a list of my professional publications.

2. I am the Senior Occupational Physician/Epidemiologist at Environmental Health Associates, Inc. located in Oakland, California. Environmental Health Associates, Inc. does research in various areas of occupational and environmental health and is a primary medical consultant for a number of companies. This research and consultation includes the field of the toxic effects of lead on adults, children and the fetus.

3. I have been an Associate Clinical Professor of Occupational medicine at the University of California School of Public Health located in Berkeley, California, since 1979.

4. Attached hereto and incorporated by reference as Exhibit B is a bibliography of some of the medical literature I have reviewed regarding the toxic effects of lead.

5. Attached hereto and incorporated by reference as Exhibit C is a written version of a presentation on Lead and Fertility that I gave in May 1985, at a medical conference held at Duke University.

6. Based on my work and review of the literature in the area of toxic effects of lead, it is my medical opinion that the current OSHA lead standard of 50 micrograms per deciliter of whole blood should generally protect adults of either sex from significant adverse effects in the various adult systems.

7. In approximately 1981, Dr. Andrew Wyrobek and I, as co-investigators, completed a study, funded by the Environmental Protection Agency, in which we evaluated the semen quality of male workers engaged in the production of batteries in Pennsylvania and who had, accordingly, been exposed to lead. The average blood lead level of these male workers was approximately 43 micrograms. In this study we compared the quality of the semen of the lead exposed workers to a control group of non-exposed males. We discovered no changes in semen quality in the group of lead exposed workers. I have also reviewed the other pertinent articles relating to the effects of lead on human males, especially on the function of the testes. Based upon the current medical evidence, it is my opinion that there does not appear to be significant functional harm to the reproductive system of male workers when the current OSHA lead standard of 50 micrograms is followed.

8. Very recent medical studies, that have come out of Boston and Cincinnati in the last year or two, are showing injury to the central nervous system as a result of fetal exposure to blood lead levels as low as 10 micrograms. These studies measured the blood lead levels of groups of infants at birth and then compared the subsequent neuro-behavioral development of these children. The studies show a direct correlation between blood lead levels and maturation levels of the infants. They suggest that even relatively low levels of lead exposure to the fetus can cause damage to the higher brain function resulting in decreased neuro-behavioral development in the child. There is no evidence of comparable harm to adults at this level of exposure. Further, while it is too early to determine conclusively from the available studies whether the damage to the central nervous system is permanent, based on current medical evidence it is my medical opinion that there will most probably be some permanent damage.

9. It is my medical opinion that the central nervous system of the developing fetus, and not the reproductive or other systems of the male or female workers, is at greatest risk from the toxic effects of lead. Because the fetus is exposed to blood lead levels similar to that in the maternal blood during at least the majority of pregnancy, it is my medical opinion that any woman who plans to have or may have children at any time in the future should not work in a job with lead exposure.

10. This affidavit is made and submitted in support of the Motion for Summary Judgment of Defendant Johnson Controls, Inc., in the above-entitled action.

Dated this 11 day of August, 1986.

[Signatures Omitted in Printing]

* * * *

(Whorton Aff., Ex. C)

LEAD AND FERTILITY

by Dr. Donald Whorton

Environmental Health Associates

Oakland, California

This paper is a brief review of the effects of lead on reproduction, primarily in humans, for both males and females. The potential occupational reproductive effects of lead became a regulatory issue in the United States when the Occupational Safety and Health Administration (OSHA) proposed a new lead exposure standard in the mid 1970's. In the proposed standard, OSHA attempted to equate the adult male and female reproductive risks from lead. This attempt at equalization of risks caused considerable controversy from both scientific and policy viewpoints. Other reports in this meeting have discussed scientific and policy issues of lead exposures, primarily for young children.

Historically, much of what is known about the effects of lead on human reproduction comes from observations made around the turn of the twentieth century. Women suffering from clinical lead poisoning have been shown to have decreased fertility, increased rate of spontaneous abortions and an increased rate of stillbirths. Lead has been used as an abortifacient since antiquity. In addition, various lead salts have been used as spermicidal agents. Thus, lead and adverse reproduction effects on women have been known for a long time. (1,2)

Results of animal studies have shown lead to have adverse reproductive effects in numerous species for both sexes. The following are representative of these effects in female animals. In female Rhesus monkeys, lead can cause inhibition of follicular growth, failure of ovulation and proliferation of ovarian connective tissue. These changes produce a decrease in fertility of the Rhesus

monkey. In hens, delay in sexual maturation, decreased number of eggs laid; and decrease in functional fertility have been shown to occur from lead exposures. In ewes, lead produces a decrease in rate of lambing and an increase in rate of spontaneous abortions. Among studies of male animals, the following are representative. In rats, lead has been shown to produce impotence, prostatic hypertrophy and a decrease in testicular weight. These effects would affect the male rat's ability to reproduce. In the mouse, decrease in fertility has been shown. (3) In the mouse sperm morphology test, lead acetate produces an increase in abnormal sperm heads. Additionally, this abnormal sperm morphology pattern can be transmitted to the F_2 generation. (4)

Is lead a teratogen? Before answering the question, some definitional clarity would be useful. Classically, a a teratogen is an agent which produces a structural abnormality or change in the embryo/fetus. These structural changes are generally classified as major or minor. Most birth defect reporting originates from the initial examination of the newborn within the first three days of extra-uterine life and recorded on the birth certificate. Most birth defect entries tend to be major effects, not minor ones. However, during the past decade or so, the concept of functional birth defect has been well accepted. This type of effect was observed in children born to mothers who were heroin addicts. These children had considerable emotional and learning disabilities. Many of these problems were not recognized until the child was 2+ years old or until the child started school.

For most teratogenic agents, there is a specific, finite time period in which the embryo/fetus is most susceptible or susceptible at all. During the pre-differentiation period, which occurs from conception day 1 to conception day 14 (the first two weeks of conception in humans), the conceptus is not susceptible to the effects of teratogenic agents. In the early period of differentiation, (con-

ception week three through conception week eight), the embryo is most susceptible to teratogenesis from teratogenic agents. Then, with the period of advanced organogenesis until birth, there tends to be an increase in resistance to the effects of teratogenic agents. (5)

For the central nervous system, the period of greatest susceptibility to teratogenic effects is conception week three through week six; however, the central nervous system remains vulnerable throughout all of pregnancy. The pathologic effects of lead on the central nervous system of children under age 5 is well recognized and accepted: encephalopathy, mental retardation, etc. One would expect similar adverse central nervous system effects to occur in the fetus with sufficient lead exposure.

There are few studies in animals showing lead to be a teratogen. In rats, lead had been shown to produce urorectocaudal malformations, while in hamsters, tail abnormalities have been reported. Cardiac abnormalities have been shown to occur in chick embryos. What is known about fetus effects in human? In the 19th and early 20th centuries, there were reports of macrocephaly of children whose parents lived in pottery making villages in Germany and Hungary. There are few other data to implicate lead as a human teratogen. (2,6)

Fahim et al (7) compared 253 pregnancy outcomes from women living in the Missouri lead belt to a similar number of controls living elsewhere in Missouri. The percentage of normal deliveries were 70 percent among the lead belt women and 96 percent among women from the control area. The percentage of premature infants born in the lead area was 13 percent compared to 3 percent in the control area. Finally, 17 percent of the pregnancies of lead belt women resulted in premature rupture of the amnionic membranes, compared to 1 percent in the control area. The infants from the lead belt area had a 3 or 4-fold increase in the cord blood lead levels compared to the controls. These data suggest an

adverse effect on the fetus. It is unclear if the effects are due to teratogenesis or direct fetal toxicity.

In 1984, Needleman et al. (6) reported on the evaluations of 4354 births in a Boston hospital for congenital malformations and maternal blood lead levels. Table 1 is adapted from the Needleman et al data. They divide the blood lead results into four categories with almost equal number of births. The categories are 0 to 4.8 μg/dl, 4.9 to 6.5 μg/dl, 6.6 to 8.6 μg/dl and 8.7 to 35.1 μg/dl. They found a statistically significant linear trend for total malformation with increasing blood lead levels. While there was no trend for only major malformations, there was a statistically significant trend for minor malformations. Interestingly, there is an inverse trend for infants born with respiratory distress and blood lead results. These data suggest lead is associated with minor malformations and may somehow reduce respiratory distress in newborns.

Needleman et al conducted a covariate analysis of relative risk for malformation at selected blood levels. They found an increasing relative risk with increasing maternal blood levels as shown in Table 2 using the blood lead level of 0.7 μg/dl as the baseline comparison level. Maternal blood lead levels of 24 μg/dl had a corresponding relative risk for malformation of 2.73. One should remember that the types of malformations Needleman et al found in excess were considered minor. Any routinely established malformation surveillance system would have detected few if any of these malformations.

The most widely quoted study of the effects of lead on male workers is the 1975 study by Lancranjan et al (8). They showed a dose response relationship for decrease in sperm count, decrease in sperm motility and increased in abnormal sperm morphology with increasing lead intoxication categories. On the other hand, they showed an inverse dose response relationship for libido, pathologic erections, pathologic ejaculations, and orgasms with

lead intoxication categories. They reported inconclusive results for the number of normal pregnancies per couple, frequency of miscarriages, incidence of ectopic pregnancies and premature births with lead intoxication categories. Based on these data one sees a diminution of semen quality accompanied by increase in sexual performance with increasing lead intoxication categories.

Wildt et al (9) studied the semen quality of 16 lead exposed men and compared them to 16 non-exposed controls. The mean blood lead level was 46.1 μg/dl for the exposed group and 21.1 μg/dl for the control group. There were no differences between the two groups for sperm count, over-all sperm morphology, prostatic function and vesicular function. The lead exposed group had better sperm motility and number of live spermatozoa at end of 1 hour than the non-exposed group.

Cullen et al (10) reported that, in six men with whole blood lead levels ranging from 66-139 μg/dl, two were azoospermic and two were oligospermic with poor sperm motility. Finally, in a yet unpublished study of approximately forty men with a mean blood lead level of 43 μg/dl, no effects were found on sperm count, sperm motility or sperm monphology.

Thus, the current data on lead effects on testicular function in humans are inconsistent. Some of these inconsistencies can be explained by differences in dose and/or methodology. Others cannot be explained at present.

There are numerous references which indicate that the fetal blood lead is either equal to or closely equal to the maternal blood lead in the second and third trimester of pregnancy. There was some discussion at the time of the OSHA lead standard that lead did not cross the placenta during the first trimester. Regardless of the validity of the first trimester lead exposure, clearly the fetus is exposed to lead levels similar to the maternal blood lead level during the majority of pregnancy. Manton (11) reported on a longitudinal study of blood lead levels in a

woman before, during and after pregnancy. He reported a doubling of pre-pregnancy blood lead levels during pregnancy and suggest mobilization of lead from bone during pregnancy as the mechanism. Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant body lead burden would pose a potential hazard to any conceptus for many years after exposures. In addition to placental transport, lead can also be transmitted in human breast milk.

We do not know what is the hazardous lead level for the embryo and fetus. What is known is for children based on experiences of lead intoxication. At present, the Centers for Disease Control (CDC) considers a child with blood lead levels in excess of 25 μg/dl to be considered lead poisoned or intoxicated.

In the more advanced industrialized societies (ones in which there are generally acceptable controls for worker lead exposures), who is at the greatest risk from the potential toxic reproductive effects of lead. It is neither the adult male nor the adult female. Rather it is the embryo/fetus of the pregnant female worker and its developing central nervous system. The individual with the next highest risk would be the nursing infant of a woman lead worker. If all members of society are to be protected, then the standards would have to be protective of these two high risk groups. Neither is a group in which most workplace standards are directed.

What are the current guidelines or standards for blood lead levels for adult males and females working with the material? Table 3 as adapted from Zielhuis (12) shows acceptable worker blood lead levels for both males and females for a number of countries or institutional organizations. The World Health Organization (WHO), United Kingdom (UK) and the Federal Republic of Germany (FRG) have markedly lower levels for female employees compared to males. Contrary, the

European Economic Community (EEC) and the United States (USA) have the same level for both male and female employees. Based on the CDC definition of lead poisoning for children and assuming the fetus is at least as sensitive as young children, then all of the children born to women workers whose employers followed the respective guidelines or standards would be considered to be lead poisoned or intoxicated. It would appear that all of these organizations and countries have decided that it is satisfactory social policy to allow a subset of children have dangerous lead exposures in utero and to risk developing serious neurological deficits which most likely will be permanent. Other papers presented at this symposium, having reported central nervous system deficits in children at blood lead levels less than 20 μg/dl, only heightens the concern for these children. One must wonder about the ethical and moral justification for such policies.

The preceding discussion about the potential fetal effects have significant implications towards employment policies for men and women. Historically, in the United States, the policy of the lead industry has been to exclude women from work with lead or at least women of child bearing age. While this is the simplest policy to administer, it clearly is discriminatory if one considers demographics of family size, age and parity, marital status and the widespread use of birth control in the US. At present, the number one method of birth control is surgical sterilization; vasectomies are a significant portion of such procedures. In some of our studies, from 20 to 40 percent of the blue-collar male work force have had vasectomies. Any policy about employing men and women or restricting the employment needs to consider the above listed factors. Personally, based on the potential for serious fetal effects plus the prolonged half-life of lead in the body, I would not advise any woman who wants to have children to work in a job with lead exposures. The same would be true for a nursing mother.

Finally, if societies are going to allow fetal exposures of relatively high lead levels due to maternal work exposures, societies must be obligated to examine and follow these children over time to determine if any adverse health effects have or are occurring. One should also realize that no investigator could ethically conduct such a study of exposing women volunteers who would subsequently become pregnant to determine if the offspring were suffering from central nervous system effects of lead. But since society has deemed such exposures at work to be legal, society has the ethical obligation to determine if it has committed folly.

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TABLE 1

Pre-Natal Lead Exposure and Congenital Anomalies

	Lead Category			
Characteristic	1	2	3	4
Range of Blood Lead (ug/dl)	(0-4.8)	(4.9-6.5)	(6.6-8.6)	(8.7-35.1)
Malformations				
Any	7.7%	6.7%	9.1%	9.6%*
Major	2.9%	2.3%	2.9%	2.9%
Minor	4.8%	4.4%	6.2%	6.7%*
Respiratory Distress	6.4%	5.3%	5.1%	4.4%*
Total Number of Births per category	1118	1068	1105	1063

* Significant ($p<0.05$) linear trends

[Ref: Needleman et al, 1984]

TABLE 2

Covariate-Adjusted Relative Risk of Malformation at Selected Blood Lead Levels

Blood Lead [ug/dl]	Relative Risk
0.7	1.0
6.3	1.87
15.0	2.39
24.0	2.73

[Ref: Needleman et al, 1984]

TABLE 3

Acceptable Blood Lead Values [ug/dl]

Organization	Workers	
	Male	Female (reproductive age)
WHO [1980]	40	30
UK [1980s]	80	40
FRG [1984]	70	45
EEC [1982]	70	70
USA [1978]	50	50

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

AFFIDAVIT OF J. JULIAN CHISOLM, JR., M.D.

STATE OF MARYLAND)
) ss.
COUNTY OF BALTIMORE)

J. JULIAN CHISHOLM, JR., M.D., being first duly sworn, on oath, deposes and states as follows:

1. I am a pediatrician licensed to practice medicine in the State of Maryland. I received my undergraduate degree in 1944 from Princeton University and my medical degree in 1946 from Johns Hopkins University School of Medicine. Attached hereto and incorporated by reference as Exhibit A is my curriculum vitae which lists, among other things, my educational background, professional experience, professional society and committee memberships, and consultant positions.

2. I am the Senior Staff Pediatrician at Francis Scott Key Medical Center and a staff pediatrician at Johns Hopkins Hospital. My particular area of expertise is the study, treatment and prevention of lead poisoning in young children.

3. I have been the Director of the Lead Program at the John F. Kennedy Institute located in Baltimore, Maryland, since 1975. In my capacity as Director of the Lead Program at this Institute I operate a clinic for the prevention of lead poisoning in children. As

part of my work at the clinic I examine and treat children with lead poisoning on a weekly basis.

4. I am an Associate Professor of Pediatrics at Johns Hopkins School of Medicine.

5. Attached hereto and incorporated by reference as Exhibit B is a current bibliography which lists my various professional publications, the vast majority of which deal with the issue of the effect of lead exposure on children.

6. During pregnancy the lead in the mother's blood transfers across the placenta to the fetal circulation. The concentration of lead in the fetal tissue increases rapidly during the last trimester of pregnancy. At birth, the fetus generally has the same blood lead level as the mother. However, the fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child. This is particularly true during the latter part of the gestation period when the central nervous system of the fetus is developing very rapidly and is extremely susceptible to the toxic effects of lead. Medical studies released in the last year or two out of Boston, Cincinnati and Port Pirie, South Australia suggest that exposure to the fetus of blood lead levels as low as 10 micrograms presents grave risk of permanent harm to the central nervous system of the fetus. The risk of harm to the fetus increases proportionately with the i of blood lead levels over 10 micrograms. Such harm includes stillbirth, reduced birth weight and gestational age, and retarded cognitive development which may result in learning deficiencies and behavioral disorders.

7. There is no medical evidence that lead exposure to the adult, male or female, has any adverse effect on the offspring. Rather, the available medical evidence establishes that it is the exposure directly to the fetus, through the pregnant woman, which causes harm to the offspring.

8. Because the fetus reacts adversely to lead at much lower levels than adults, it is my medical opinion that, in order to protect the health and safety of the fetus, under no circumstances should women capable of bearing children be permitted to work in any area where their blood lead levels may rise above 10 micrograms per deciliter. Conversely, in my medical opinion it is generally safe for males and nonfertile females to work in areas where blood lead levels may reach 50 micrograms, at least where there are no other indications of ill effects. It is the fetus' special susceptibility to lead and dependence on the maternal environment which medically requires the different treatment of fertile females.

9. In my opinion there is medical justification for including in this prohibition women who are capable of bearing children but who do not have any present intention of ever having children. This medical opinion is based on the fact that many pregnancies are unplanned and occur despite the use of even the most reliable methods of birth control.

10. In my medical opinion, excluding only women who are actually pregnant from work areas where there are elevated blood lead levels would not sufficiently protect the health and safety of the unborn child. My opinion is based on the substantial medical evidence which establishes that lead remains in the body for a significant period of time after removal from a high lead environment. Lead builds up not only in the blood and soft tissues, but is also stored in the bones. Following removal from the high lead environment, as the lead built up in the blood and soft tissues leaves the body, the lead in the bone begins to turn over, thus maintaining high blood lead levels even long after removal. As a general rule of thumb, it takes approximately two or three times as long for the blood leads to decrease as it did for such blood levels to increase. Therefore, if a woman is exposed to blood lead levels in excess of 25

or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered. Moreover, because the bones may decalcify during pregnancy in order to provide the fetus with calcium, there may be an additional danger of transfer of stored lead to the fetus.

11. I have reviewed the Fetal Protection Policy which is currently being utilized at the Battery Division plants of Johnson Controls, Inc. In my medical opinion this policy is necessary and effective to protect the health of the unborn children of female workers from the serious risk of harm that is likely to result from exposure to blood lead levels of over 30 micrograms. At the time the Fetal Protection Policy was adopted in 1982, the general consensus of medical opinion was that the upper limit of acceptable lead exposure to young children, and by extension, the fetus, was 30 micrograms. However, it has always been my medical opinion that the fetus should not be exposed to blood lead levels above normal community levels. The recent Boston, Cincinnati and Port Pirie medical studies on infants confirm this opinion and suggest that the upper acceptable limit of fetal exposure should now be lowered to 10 micrograms.

13. This Affidavit is made and submitted in support of the Motion for Summary Judgment of Defendant Johnson Controls, Inc., in the above-entitled action.

Dated this —— day of August, 1986.

[Signatures Omitted in Printing]

* * * *

[EXCERPTS OF SILVERSTEIN DEPOSITION]

(Jones Aff., Ex. A)

* * * *

[6] Q Are you familiar with the fetal-protection policy which is the subject of this Court Action, and which is in effect at the Plants of Johnson Controls?

A I believe so.

* * * *

[7] Q (BY MR. JASPAN) Do you have any problems with that policy from a medical point of view or otherwise?

[8] A Yeah. I think it's—that it's based on incomplete and an incorrect understanding of medical science, and that it creates a, a set of conditions that are detrimental to public health.

Q Okay. Can you be more specific as to what parts of it you have problems with, and the basis for your disagreement?

A The, the policy's stated-objective—may I—the policy' stated-objective is to protect health of employees, an. to protect the health of unborn children. The method chosen to do that is to exclude women of childbearing capacity from certain jobs under certain conditions. I think that that—those actions are insufficient to either protect the health of battery-plant employees, or to protect the health of unborn children.

In fact, the implementation of that policy would leave conditions such, that the health of unborn children and the health of employees would be in great jeopardy.

Q Okay. In what way does that put the health of unborn children in great jeopardy?

A The policy is silent with regard to the dangers to the male-reproductive system, and to the development of children whose fathers have been exposed to lead.

[9] Q Any other way is it—any other way that it is detrimental to the protection of the health of the unborn children?

A Insofar as the risks to reproductive health from lead are shared equally by men and women at all exposure levels, the policy is, is ineffective.

Q And you also indicated that the policy fails to protect the employees?

A Yes.

Q In what regard?

A The policy erroneously states that the risk to the unborn child is present in a much lower blood level than adults, and insofar as it's designed to provide a greater level of protection, it leaves adult employees at risk.

* * * *

Q Okay. If I understand what you've said, and please correct me—let me try to put it in my lay language—the risk to an unborn child is created whether it's the mother or the father who is exposed at same levels?

A Correct.

[10] Q And the risk is similar whether it's the mother or the father who is exposed?

A Correct.

Q And secondly, the—according to what you've told us, the risk to the adult is similar to the risk to the child at the same levels, or to the unborn child?

A Correct.

* * * *

Q Let's talk about first—the first part of what you indicated, namely that the risk to the unborn child [11] is equal, whether it's the mother or the father who is exposed to a particular lead level.

A Uh-huh, uh-huh.

Q On what do you base your conclusion that the risk is similar with respect to whether it's the mother or the father who is exposed?

A Okay. There is an extensive body of scientific literature dating back into the mid 1800's, that—which has subsequently been reviewed by generations of medical experts. And that body of scientific literature indicates

without question that when either men or women are exposed to lead, that there are risks and damages that occur in the area of reproductive health.

There is a great deal of information that, that demonstrates that lead is toxic to the reproductive systems of adult men and women that damages the germ cells, the ovaries, the testes of women and men respectively, that this physical damage to the germ cells is then expressed as defects in reproductive, reproductive function including sterility, stillbirths, low-birth rate, alterations in, in reproductive functions such as impotence, in addition to the effects on the reproductive tissues of men and women themselves. It's been demonstrated in both [12] animal and human studies that offspring born to, to either the lead-exposed mother or father can sustain damage.

Q Resulting from—other than the exposure to the—exposure to the reproductive system, or damage to the reproductive system?

A No. Presumably that, that—we're talking about a constellation of effects on reproductive integrity, and there are undoubtedly a variety of mechanisms through which these effects are, are expressed, but they're all reproductive-health effects.

Q I take it, your conclusions in this regard are based upon your review of the literature?

A That's correct.

Q And not based upon any independent studies, or experiences, or examinations that you've conducted?

A That's correct.

Q Would you identify—well let me withdraw that. At what levels of lead exposure as expressed in blood of the adult, in the mother or the father, do these concerns arise, in terms of the actual damage to the germ cell, based upon your review of the literature?

A Well first of all, the, the levels that have been associated with, with effects have been reported down to and below 20 micrograms of lead in blood, whether [13] either males or females have been exposed. And secondly,

I think it should be made clear that the effects are of equivalent type and magnitude, whether males or females have been exposed at similar blood levels.

Q Then let's talk in terms of specific studies, or specific sources of your conclusion. Do you have specific articles or studies that you rely upon for that statement that the effect on the reproductive system of both the male and the female have been shown at levels below 20 micrograms?

A Yes. As I indicated, there is a substantial body of scientific literature dating back to the 1800's, and if you'd like, we can start to—start to go through it.

* * * *

[14] A The first article is entitled, Some Actions of Lead on the Sperm and on the Male Reproductive System. This article appeared in the American Journal of Industrial Medicine in 1983. It's authored by Thomas, Thomas & Brogan, T-h-o-m-a-s, T-h-o-m-a-s & B-r-o-g-a-n. This is a review article that contains approximately a hundred references, and indicates—gives information in there, areas of relevance. One is that it—that it demonstrates that it—that historically there have been a large number of studies done during periods of time when lead exposures were generally higher than they are today, showing that [15] there are reproductive effects to the, the systems of both men and women, and their offspring exposed to lead, including decreased fertility, miscarriages, stillbirths, damage to, to sperm, and probably various types of birth defects.

Secondly, the—this review article reports nine more-recent studies done on various animal species that indicate that male animals exposed to lead sustain severe reproductive damage, including abnormal sperm viability and performance, abnormal sperm shape, degeneration of the tissues of the, the testes, and infertility.

Thirdly, the study reports that—I'm sorry, this paper reports ten studies on occupational groups, in which male

workers and female workers exposed to lead has been found to sustain chromosome damages. It also indicates that, that half of those studies were done among battery-plant workers, and makes the point that the chromosome damage which is measured in generally white blood cells increases the, the plausibility that, that the damages to sperm that's been reported occurs through damage to the genetic material of sperm, and that the damage to sperm being genotoxic damage can then be expected to express itself as develop—developmental [16] abnormalities in the offspring that, that are, are successfully conceived, and successfully survived a term.

Q Does that article indicate the level at which the damage to the reproductive—the lead level at which the damage occurs, which affects the offspring? What level of the exposure of the adult?

A This particular articles does not go into, into detailed critiques of the—of the various studies that it reports on. However, what I would like to do is move on to some of those studies, and we can talk about them directly, rather than relying on—

Q Fine.

A —Thomas & Brogan's view.

* * * *

Q Okay. Next?

A In 1972 Hilderbrand, H-i-l-d-e-r-b-r-a-n-d, published [17] an article entitled The Effect of Lead Acetate on Reproduction. And this was in the American Journal of Obstetrics & Gynecology. This was a study in which rats were fed an organic lead in the—in the female rats, at blood-lead levels between 14 and 30 micrograms. There were irregularities of the reproductive cycle, and at blood-lead levels, which reached 50 micrograms per hundred millimeters of blood, there were ovarian cysts, and a decrease in the maturation of eggs.

In the male rats who were exposed to lead, there was impotence, and a decrease in sperm motility, sperm moyement at blood-lead levels between 14 and 26 micrograms.

When the blood-lead levels reached 50 micrograms, there was a decrease in the maturation of sperm, and there was testicular damage that was found. Those are the basic findings in the Hilderbrand study.

Q Are there—is there evidence that the levels, blood-lead levels by which a—of a, an animal, and similar to the blood-lead levels of a human will be affected in the same fashion?

A One of the important reasons that so many studies have been done on the mammalian species of this type is that the, the biologic and physiologic properties [18] of, of the rodents are substantially similar to the—this—the equivalent systems in humans, and so that the results do have meaning for human experience.

Q And I assume that by that, there would be reason to believe that the nature of the damage caused to the rats could or would be similar to the damage caused by the adult systems?

A There is not only reason to believe that, but evidence to show that.

Q Now my question goes to the levels at which that lead—and could you show me, is there evidence and could you cite for us evidence if you believe there is, showing not just that the nature of the damage to the adult and to the human is similar to that in the rat, but whether the levels, the blood-lead levels at which that type of damage is caused in the rats is substantially similar to the levels at which similar damage is caused in the adult?

A Yes. I, I, think that that information exists, and that as we continue this discussion, that we will make our way through those arguments and that evidence.

Q Can you cite a particular article offhand, before we even get to it?

A There is a, a, a study that was done by NIOSH, [19] entitled Reproductive Outcomes in Wives of Lead-Exposed Workers. This shows some similar effects at similar blood levels in men who are exposed in battery plants. I am afraid that evidence in human studies of the

kind you're asking for doesn't exist with respect to the effects on the female-reproductive system, that the conclusions that have been drawn by scientists over the years regarding the dangers to the female-reproductive system are of two indirect sorts. One is extrapolation from animal studies, and the, the second is from studies of lead-exposed children.

Q Let me go back to the findings in the Hilderbrand study. As to the male rats, you indicated that blood leads between 14 and 26 had resulted, according to that study, in impotence and decrease in sperm motility; isn't that correct?

A That's correct.

Q In terms of the effect on the child?

A Uh-huh.

Q Is there evidence that impotence has an effect on an unborn child? Would impotence be total inability to conceive, or—

A Presume—presumably.

Q So I assume by definition then, when there is [20] impotence, there is no effect on the—

A There would be functional infertility.

Q And the effect of decreased sperm, decreased sperm motility, how would that affect an unborn child?

A Well if we were considering the Hilderbrand study alone, we would have to speculate about that, and the reasonable speculation would be that the effect might be twofold. One is that abnormal sperm might be less likely to fertilize an egg, and would result in decreased fertility. Secondly, secondly, we could—we could postulate that abnormal sperm, insofar as they carry damaged genetic material, might, if an egg was successfully fertilized result in damaged offspring, and we would have to guess as to how that damage might be expressed.

Q And that would simply be speculative at this stage, of the latter point?

A If the only study in the literature were the Hilderbrand study.

Q Proceed.

A Let me refer to a paper published by Wyrobek & Bruce, which is a chapter in a book called Chemical Mutagens, and it's titled, The Induction of Sperm Shape Abnormalities in Mice and Humans. These scientists report on a large series of studies that they have [21] done in which animals have been exposed to a variety of chemicals, and the shape of sperm has been studied. And with respect to lead, they report two types of effects in mice. The first is that they find that when mice are exposed to lead, inorganic lead, that with increasing exposures to lead there are increasing proportions of abnormal sperm. And they provide specific evidence to that effect in this study. Secondly, they report on a different type of investigation, one in which mice were exposed to lead, and then the offspring of those mice, the next generation is studied, and they find that in the offspring of mice who have been exposed to lead, that there is an abnormally-high proportion of individuals with abnormal numbers of abnormal sperm.

They conclude from these studies that sperm abnormalities are caused by lead exposure, and that those effects appear to be heritable effects, and that sperm shape therefore is a function of genetic information, abnormal sperm shape, indicating genetic damage, which can be expressed in later generations.

Q Does that study indicate the level of lead exposure in the parent at which the abnormality is likely to occur?

A The studies that Wyrobek & Bruce did, did not report [22] blood-lead levels. They report exposure levels. And while it's fairly easy to draw a, a relation between blood-lead levels in a mouse, and blood-lead levels in a human, it's much more difficult to draw a relationship between a dose of lead in the diet of a mouse, and the blood-lead level in a human being. And they don't provide that kind of information. What they do show is that there are consistent dose-response relationships between sperm abnormalities and lead exposure.

Q What do you mean?

A So that higher doses are associated with greater abnormalities, and lower doses, while still producing abnormalities, are associated with a lesser number of abnormalities. And their information does not indicate nor suggest that there are thresholds below which exposure would not produce sperm abnormalities.

Q Does that study provide an indication of the nature of the abnormalities of the sperm, and the effect of those abnormalities on the offspring, other than what you've testified as producing abnormalities in the sperm of the offspring?

A In—they are—they are studying sperm shape, as an indicator of genetic damage, and the ultimate effects of that damage, based only upon their studies [23] would be speculation.

* * * *

The next study is entitled, The Reproductive Ability and Progeny of, of One, Lead-Toxic Rats. This was authored by Stoe, S-t-o-e, and Goyer, G-o-y-e-r, and published in the Journal, Fertility and Sterility, in 1971.

Stoe and Goyer fed rats inorganic lead with their diets, and they then mated rats, and observed the outcomes of subsequent pregnancies, and they looked at four different groups. They looked at the outcomes of pregnancies that had occurred from the mating of two unexposed rats. They looked at the [24] outcomes of pregnancies from the matings of rats that had both been exposed to lead, and they looked at the outcomes of pregnancies when either the male or the female, but not the other, were exposed. And they found that when either the male or the female were exposed to lead, there was decreased size of litters, that there was decreased birth weight of offspring, and decreased survival of offspring shortly after birth.

Q Any further conclusions from that study?

A They concluded that the data identifies specific deleterious paternal and maternal effects of lead toxicity

upon rat reproduction, and that the toxic effects were at least in part a function of genetic damage.

Q Do they draw any conclusions with respect to human exposure through lead?

A No.

Q From that study are you able to conclude the levels at which human exposure might create similar types of damage or effects?

A They—from this study alone, no. They didn't measure blood leads. However, we know from the Hilderbrand study, for example, that damage to the reproductive systems of the adults occurs at levels [25] down to 14 micrograms. And I think it would be a reasonable conclusion that the effects on the offspring measured by Stoe and Goyer are a result of that same type of damage to the adult-reproductive systems.

Q The Hilderbrand study was again the adult-reproductive system of animals of some type?

A Correct.

Q Rats, I believe on that basis?

A Correct.

Q Any further studies on which you relied for your conclusion?

A Let me refer you to a study entitled The Influence of Parental Lead Exposure on Subsequent Learning Ability of Offspring. This was published in the Journal called Pharmacology, Biochemistry and Behavior in 1975. And the lead author is Brady, B-r-a-d-y. Brady again looked at a group of rats who were exposed to lead, and in particular looked at the offspring to rats who had been exposed, and once again looked at the offspring in different groups, depending on whether the, the mother or the father, both or neither had been lead-exposed and in this case the study did not look at any of the, the specific measurable anatomic effects that for [26] example Stoe and Goyer looked at, but rather focused on development of the young offspring, and specifically Brady looked at learning ability on a discrimination test. This

was a test in which the, the infant animals had to perform a, a task that required discriminating between different visual stimuli and various measurements were taken that indicated how successfully these infant animals were able to learn. And Brady found that animals born to parents, both of whom had been exposed to lead, had a markedly-decreased learning ability, and that animals born to parents, one of whom was exposed to lead, whether that was the male or the female also had a substantially-decreased ability to learn and to perform.

Q Did that study identify in any way the levels of lead exposure correlating to this decrease in learning ability?

A This study didn't measure blood leads, and did not attempt to guess what those blood-lead levels might have been.

The authors do indicate they believe the effects that were measured are a result of damage sustained to the reproductive systems of either the male or the female. And insofar as that's true, we have to look at other evidence, such as we've already [27] discussed, that indicates the type of damage that's—that occurs to the reproductive system of lead-exposed animals. And we know from the other studies that that damage occurs at extremely low levels of exposure of blood lead, as measured by blood-lead levels.

Q You're referring back to the Hilderbrand study again?

A Right.

Q Any further articles on which you relied for the conclusions that you expressed earlier at this point?

A Huh-uh. There is an article that was published in the Journal called Infertility, in 1978, by Braunstein, B-r-a-u-n-s-t-e-i-n, entitled Hypogonadism, H-y-p-o-g-o-n-a-d-i-s-m—in chronically lead-poisoned men—and this was a—this paper reports a series of patients that these investigators examined and treated. There were 10 men with occupational lead exposure, and they report that

these men had noted a decrease in sexual drive following exposure, and that on two of the men, testicular biopsies were conducted which demonstrated scarring of the testicles, decrease in sperm count, and other cellular abnormalities. Four of the seven—four of the 10 men that they studied were identified as, as being lead-exposed, but without [28] clinical evidence of lead poisoning, despite a range of exposure from 1 to 23 years, and that the others had exposure presumably in higher concentrations, so that they had been judged in higher clinical-lead poisoning with other symptoms.

Q Do they indicate the lead exposure of the 10 individuals?

A What do you mean by lead exposure?

Q Blood levels?

A No, they don't indicate blood levels.

Q Would it be fair to conclude that this study would not allow one to draw conclusions as to the blood-lead levels at which the effects described would occur?

A Wait, excuse me, blood lead—they, they do report on blood-lead levels, and they indicate that at the time of testing the average blood lead among the lead-poisoned group was 38, and among the lead-exposed group it was 29. And they also indicate that for both groups that at some time in the past there were higher blood leads that were measured up to 80 and above.

* * * *

[32] Q Let me rephrase it, so we have it clear on the record. It's that—your earlier testimony that certain findings or conclusions were reached in that Braunstein study, including decreased-sex drive, scarring of the testicles and decreased sperm count?

A Uh-huh.

Q My question specifically is, the findings and conclusions of that study could have resulted from recent lead exposure, or lead exposure sometime earlier, which I understand reached and exceeded 80 micrograms?

A Yeah, that's correct. And from this study we can't tell what the, the responsible lead levels might have

been. I want—I want to indicate that in fact there was some effort made in, in this study to [33] look at motility and shape of sperm, and they did not report any abnormalities of those sorts.

Q And if I understood your earlier testimony, motility and shape of sperm would reflect recent exposure, as opposed to the more-historic exposure?

A Well for, for those kinds of abnormalities, it would be easier to reach a conclusion about the time of exposure. With some of the other abnormalities, it's simply impossible to determine that.

Q And the absence of decreased motility or abnormal shape of sperm would indicate that the recent exposures did not cause at least that type of damage?

A At least that, yeah. It indicates that they didn't cause damage, that they didn't find—or it indicates that that damage wasn't caused in such a way that using their methods, they were able to find it. That's all that it indicates.

* * * *

A There was a study that was authored by Cullen, C-u-l-l-e-n, published in the archives of Environmental Health in 1984, entitled, Endocrine and Reproductive Dysfunction in Men Associated with Occupational Inorganic Lead Intoxication. And this report is on a series of tests done among seven men, who had [34] occupational-lead exposure, and clinical-lead intoxication with blood leads between 39 and a hundred, but largely above 60. And they found in this group that there were defects in the development of sperm, including abnormal-sperm shape and motility.

Q Anything further?

A Regarding that study, no.

Q Any further studies?

A Oh yeah. There is a study in the archives of Environmental Health, published in 1975 by Lancranjan, entitled The Reproductive Ability of Workmen Occupationally Exposed to Lead. In this study a hundred and

fifty men employed in a lead acid battery plant were investigated, and these men were divided into several different groups. There was a group designated as those with lead poisoning, whose blood leads were 74. There was a group with moderate, moderately-increased lead absorption, whose blood leads were 52, a third group with slightly-increased absorption, whose blood leads were 41, and a fourth group who were said to have physiologic-absorption of lead, whose blood leads were 23 micrograms. And the investigators looked at the motility of sperm, the movement of a sperm, the amount of sperm, and the shape of sperm, and they found that with [35] respect to all these measures of reproductive integrity that there was a relationship between lead exposure and effect, and that the effect was greatest among those with the highest blood leads, and that it was present though in lesser degrees among those with the lower blood leads, down to and including the group whose blood leads were 40, 41.

Q All three effects?

A This was true for all three effects. There is a, a table in their paper—excuse me, there is a figure in their paper which illustrates graphically the relationship between abnormally-shaped sperm and blood lead, and it demonstrates a very strong and consistent dose-response relationship, in which all of the lead-exposed groups who had blood leads that were higher than a completely nonexposed group had higher proportions of abnormal sperm, and this effect was noted, starting in the group of blood leads in the range of 40, and was progressively worse at the higher blood-lead levels.

Now they also looked at motility and amount of sperm, and they found the same relationship. In fact, for those measures, the relationship was even stronger and more marked.

Q Are you aware of any criticism of the men—the [36] Lancranjan study—are you aware of any criticism as to the manner in which that study was conducted?

A I'm aware that during the hearings that preceded the adoption of OSHA's current lead standards, that this study was discussed at great length by numerous witnesses before the OSHA panel, and that some of those who testified were critical of the study, but that when the body of evidence, which was a substantial body of evidence, and testimony was reviewed by the OSHA experts who were charged with the responsibility for establishing the lead standard, they felt that the language and study had scientific merit, and that conclusions could be reliably drawn about the reproduction damage to men exposed by lead, and that in particular the conclusions that Lancranjan drew were appropriate. The OSHA panel felt substantially strong about the study, so that they published in the preamble and attachment documents to the OSHA standard a fairly lengthy discussion of the language in paper, and their reasons for believing that it was a valid scientific study.

And I should also point out that the archives of Environmental Health in which this study appeared is a well-respected peer-reviewed Journal, so that in order to be published it was necessary that the [37] paper undergo critical review by experts in the field.

Q Anything further as to that study, or any further studies?

A No more with respect to that study.

* * * *

Q (BY MR. JASPAN) You are going to go into another article, I believe?

A Yeah. This is a research paper that was prepared by a group of NIOSH investigators, the lead investigator being Selevan, S-e-l-e-v-a-n. This is entitled, Reproductive Outcomes in Wives of Lead-Exposed Workers. This is dated December, 1984, and it is a NIOSH document that's available through the Federal Government's National Technical Informational Services.

Selevan looked at the reproductive outcomes in the families of 376 male lead battery-plant workers, and they obtained a—pregnancy information through interviews of the workers' wives, and they obtained information about blood leads through company records. Only the men in this study were exposed to lead, and lead exposures were classified into four groups, the unexposed group either had blood-lead [38] levels that were less than 25 micrograms, for a hundred liters of blood, or in some cases workers were considered to be unexposed during the period of time prior to employment, in an industry where lead was used. The second group were those that had blood leads ranging between 25 and 45 micrograms of lead, and they were the low-exposure group. The medium-exposure group had blood leads ranging betwen 45 and 60, and the high-exposure group had blood leads in excess of 60 micrograms. And the investigators looked at fertility, and they looked at fetal loss, in other words, early, early miscarriage, spontaneous abcrtions, stillbirths.

With respect to fertility, the investigators calculated what are called standardized-fertility ratios, in which the reproductive history among the families of the workers were compared with the reproductive histories for the Nation as a whole, with consideration being given to any differences there might be between the workers and the general population, in such factors as age, number of prior children, or pregnancies. And the results indicated that there were significant deficits in fertility, significant loss of fertility in the lead-exposed groups, and that those changes were found in all three exposure [39] levels. And those effects were noted when all the appropriate controls were made in the calculations for other factors that might plausibly explain the outcomes.

And in the group of workers who were between 25 and 45 micrograms, the fertility in their families was 73% that of the normal population. In other words, there was a 25% loss of fertility attributable to lead exposure

when only the fathers had been exposed to lead in a battery plant.

Now NIOSH did a second type of study in which they looked at a second type of calculation, in which they looked at fetal loss, and again they found that lead was associated with fetal loss.

Specifically the odds of, of having an adverse-pregnancy outcome were 30% higher among those with low blood levels, low blood-lead levels, and no cigarette smoking, low blood-lead levels among the fathers, and no cigarette smoking among the mothers. When compared with the nonexposed the nonlead-exposed controls, the adverse effects got worse, when in addition to lead exposure cigarette smoking was taken into account, so that cigarette smoking plus lead exposure was worse, in terms of reproductive outcome, than lead level alone.

[40] With respect to the fertility—excuse me, with respect to these fetal-loss findings, among those who—in any of the smoke—cigarette-smoking groups, there was an excess-odds of, of reproductive damage among all of the lead-level groups, but a consistent dose-response relationship wasn't found. In other words, the higher the workers with the higher blood leads, did not necessarily have greater effects than those with the lower-lead levels. This is consistent with the other pieces of the study, the infertility piece of the study. In, in fact, what's happening is that as blood-lead levels increase, not only is—excuse me—as blood-lead levels increase, the nature of the outcome, as well as the magnitude changes, so that at the higher levels of blood lead, the likelihood of infertility is increased, because the embryo or the fetus doesn't—is not even conceived, whereas at the lower levels of lead exposure damage is sustained, but the pregnancy is not necessarily terminated, and there are excesses in—excuse me, the pregnancy continues, but may be terminated during pregnancy, and the effects would be expressed, expressed then as early-fetal loss.

Q Anything further on that study?

[41] A No.

Q Did that study measure the blood leads of the mothers, and the possibility of exposure of the mothers through the fathers?

A Yes, it did. I'm glad you raised that. I had forgotten to point that out. The blood leads in the mothers were—the main blood-lead levels in all of the groups for the mothers were less than 16, and in the—in the families whose father's blood lead was less than 40, the mother's blood lead was less than 14.

Q Anything further in that study?

A No.

Q Any other studies or articles on which you relied?

A Well I don't want to go into, into detail on additional specific studies, but I do want to point out that the literature on, on these subjects, subjects, is truly voluminous, and that there are several authors who have reviewed and critiqued a much-wider range of studies than we've talked about so far. As far back as 1934 the standard textbook on Industrial Toxicology written by Alex Hamilton indicated that there is incontrovertible evidence both from animal experiences and from observations on human beings that lead has an injurious effect on [42] the cells of both sexes. And in subsequent editions of that textbook, those conclusions were strengthened in light of subsequent publications in the literature, so that in 1949 the textbook which at that time was authored by Hamilton and Hardy indicated that apparently lead poisoning in the fathers does not lead so much to interruption of pregnancy as to injury to the health of the child, and ten—the tendency to its early mortality.

And in the 1974 edition, the textbook again, as in previous editions, reported on a whole series of scientific papers, and concluded from these data—it is reasonable to conclude that lead is a poison to the germ cell, male as well as female.

There is a more recent edition. I think it's the 1973 edition of the same textbook, which continues to be the

standard textbook in the field, which reaches the same conclusions.

Now in addition to that, I want to point out that all of the articles that, that we've discussed have extensive bibliographies, and they all have articles that are testing hypothesis that have been generated as a result of other studies. So there is in effect a multiplier effect, and we've just skimmed the surface of the information in this area.

[43] During the hearings on the lead standard several years ago, a lot of this information, at least that which was current up until 1978 was discussed in public, and OSHA has summarized a lot of that information in the preamble, and the attachment to the lead standard. And so there are additional studies that are available by going through that OSHA material.

Q Are there any studies, other than the ones which you have discussed, which you specifically relied upon in terms of your conclusions, and more specifically that reflect levels at which male exposure—of blood-lead levels at which male exposure creates the damage that you've—the potential damage that you've identified?

A I've indicated the, the studies which have the, the most specific and immediate relevance to the kinds of judgments that we're trying to make, but it would really—really be a mistake to, to indicate that it's a, a—appropriate to draw a judgment on the basis of a single study, rather than a, a systematic and coherent review of a whole body of scientific information. Patterns of consistency and repeatability are as important as particular individual findings, and so I think that, that the judgments [44] that are reached really take into account a wide spectrum of information, but I have tried, to the best of my ability, to indicate some of the, the key findings.

It would be incorrect, because I went through in detail five or six studies, to tell you that there were no others, the details of which have relevance and importance.

Q The question is, specifically, are there other studies which you rely upon, which include findings as to specific levels at which male exposure creates hazards to the reproductive system?

A I think that's—that there probably are additional studies in this enormous collection of material, but none that, that I'm prepared to discuss in detail right now.

* * * *

Q (BY MR. JASPAN) Are you aware of other studies which [45] specifically address the danger of lead exposure to the unborn fetus?

A No, not when you—not when you phrase it like that. I'm a—unaware of, of human studies in which fetal health has been directly examined among lead-exposed populations. Now, if you are thinking of other types of studies, maybe you could clarify the question.

Q Are there other types of studies, other than human studies where conclusions have been drawn as to the dangers of lead exposure to the unborn fetus?

A There is a whole field of animal-developmental toxicology in which animals are exposed to a variety of chemicals, and adverse-fetal outcomes are studied, and those include studies on lead.

Q And do you have any opinion as to the danger to an unborn fetus of lead exposure?

A Yeah. Lead is a—lead is a very potent reproductive-toxin that affects the, the reproductive system of adult men and women, and to the—to their unborn children, during pregnancy and subsequently, and the effects are equally likely to be expressed, whether the exposure is to the male or the female parent.

* * * *

[48] Q And do you concur with those conclusions that have been expressed as to that concern, comparable—com—or similar to the—what the dangers of—to young children are, as relates to cross-placental exposure of lead of the fetus?

* * * *

A I think lead is a—is a danger, whether the adult man is exposed, the adult woman is exposed, children in their developmental stages are exposed, a fetus, or embryo in development are exposed, or the, the fertilizd egg in its earliest stages, as a unique organism is exposed.

And my conclusion is that the dangers are of equivalent type and magnitude, whether the exposure is through the female or the male side of the human race.

Q Is—isn't there also danger to the adult who is not capable—of the adult female who is not capable of bearing children, the adult male who is not capable of bearing a child? Are there dangers of exposure?

A Definitely. Lead is a poison that has many, many [49] effects beyond those to the reproductive system.

Q And would you agree that the level at which lead is a danger to the adult-reproductive system is comparable to levels at which lead is also a danger to other adult systems?

A Would you rephrase that?

Q Yes. It's my understanding that you agree with the conclusion that lead is a danger to the adult—to adult systems, other than the reproductive system?

A That's correct.

Q Would you agree that the levels at which lead is a danger to those systems, other than the reproductive system, are similar at least with respect to some of the other systems, as to the level at which lead is a danger to the reproductive system?

A That's correct, insofar as my belief is that lead has toxic effects at levels—at blood-lead levels, all the way from a hundred and greater, down through and below levels of 20 micrograms. I think there are reproductive hazards that are associated with exposures throughout that spectrum of exposures, and there are dangers to other organ systems of both adults and children at levels throughout that whole range of exposures.

Q Would you also agree that the extent of danger at [50] various blood-lead levels is greater in the child than in the adult?

A No.

Q You would conclude that the dangers to the adult systems occur to the same degree—well—and to the same degree in a similar fashion to the adult as to the child?

A I, I believe that there are substantial dangers to the adult and the child, that—at all the levels of exposure that I've just discussed.

Q Are you familar with the January, 1985 version of the statement by the Center for Disease Control—the Centers for Disease Control, entitled, Preventing Lead Poisoning in Young Children?

A Yes.

Q And you're aware of their change in definition modifying the definition of elevated blood-lead level in children from 30 micrograms down to 25 micrograms?

* * * *

[51] A All right. Okay. All right. I'm aware of this.

Q (BY MR. JASPAN) And in fact that was one of the basic modifications in the change to the 1985 version that you already talked about?

A I think that's a fair statement.

Q Is it your same conclusion that the same definitions and same levels of concern expressed in that article equally apply to adults?

A Most definitely, they should. If you look historically at the clinical and public-health practice with respect to lead exposures and toxicity, you'll find that the understanding about the toxicity of lead has improved over the years, so that the definitions of undue-lead absorption and lead toxicity have been restated numerous times, that each cycle, each regulatory cycle, or each cycle of public review or agency review over the last 20 years has resulted in a decreased—in a decreased level of lead exposure, which is deemed to be appropriate, and this is true for both adults and children then, and it's true for community

exposure, and occupational exposure, and it's also true that historically the assessments with regard to children have kept one step ahead of the assessments with respect to adults, so that if you go back ten years, 15 years, [52] 20 years, you'll find that the judgments that are—what are acceptable for children are higher than what they are, and the judgments as to whether they're acceptable to adults are a little bit higher than what they're stated to be for children, and higher than what they are today, but that invariably the, the statements and the policies from the scientific community and the regulatory agencies regarding adult exposures and toxicity have eventually caught up to the approaches used with respect to the evaluation of toxicity in children, and I would anticipate that this will happen again, because the scientific information that exists certainly is adequate to indicate that adults exposed to blood-lead levels below 40—below 30, down to 25 are affected in manners that are substantially similar to the types of effects that—for which there is concern in children.

* * * *

[53] Q * * * You agree that at particular points in time, including currently, the levels identified by Government agencies, by much of the literature, have, for the levels at which lead exposure is identified as dangerous for children, have generally been lower than those which have been identified for the adult?

A The levels identified by Government agencies and clinical—and the clinical literature usually identified lower levels of concern for children than adults. The levels identified in the broader scientific literature in fact indicate that the levels are comparable, and when, and for reason that, that all of us could speculate about, the public concern and regulatory policies are usually focused more strongly on the evidence on the children's side, than the adult's side.

Q And your conclusion would be that the levels are substantially similar for both groups?

A That there are—that there are significant and important effects at substantially similar levels for adults and children.

[54] Q Would the same be true for the unborn fetus?

A The same would be true for the unborn fetus.

* * * *

Q Can you identify for us any literature which draws the same conclusions that you have drawn with respect to the level of danger of lead exposure for the adults and children being equal, other than with respect to the effects to the reproductive system? In other words, if I'm understanding your testimony, it's your opinion that the dangers existed—similar, similar dangers existed at similar levels, even without regard to the reproductive system?

A Yes.

Q And I'm asking if there is any literature or studies that you are aware of that reflect that opinion, which if I understood your testimony is contrary to the clinical and Governmental publications?

A Well as I indicated before, there is a large volume of literature with respect to reproductive hazards of lead. You can multiply that—however tall that stack of papers would be, you can multiply that several-fold with regard to the literature concerning [55] other effects, and what I—I think it's a responsive answer to your question to indicate that my judgment is based on evaluation of a substantial body of scientific literature, that there is evidence on which I may base my judgments, but not—I'm not prepared—the specific question you asked was directed at the conclusions of others, and I'm not prepared to testify about the conclusions of others. My views are based on evidence that's been presented and developed by others, and there is a large body of that.

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[EXCERPTS OF SILBERGELD DEPOSITION]

(Jones Aff., Ex. B)

* * * *

[12] Q Basically what are the hazards of lead exposure?

A Under lead exposure as associated with a number of toxic effects on many organ systems, most prominently the brain, reproductive system, kidney, liver, neuroendocrine, blood forming organs, and possibly also as a carcinogen.

Q What is the impact on each of those organs?

A The impact in all respects is adverse. On the [13] brain lead can damage and even kill brain nerve cells leading to detriments in learning, memory, intelligence as well as changes in mood, and effects in the kidney, they damage the ability of the kidney to regulate body metabolism and excrete amino acids and other substances.

In the liver it can cause a condition known as porphyria or a derangement in heme synthesis which affects the ability of the liver to clear both endogenous and exogenous substances such as hormones and drugs. In blood forming organs lead inhibits the stability and formation of the red cell as well as the heme biosynthetic pathway which exists in the cells as well.

It also affects the calcium metabolism in the bone and elsewhere by affecting the regulation of vitamin D and other hormones which control calcium metabolism. Lead affects the reproductive organs, both the male and female, damaging cells in those organs and inhibiting their function causing infertility in both males and females. Spontaneous abortion in females as well as fetal toxicity very similar to toxicity in adult humans.

[14] As a carcinogen recent studies conducted by an industry consortium have found increased rates of certain cancers. There is nothing to suggest a specific type of cancer associated with excessive lead exposure, but there is an increase in mortality due to a number of cancers.

Q What studies are those?

A These are the studies by Clark Cooper undertaken on behalf of ILZRO, the International Lead, Zinc Research Organization.

Q In terms of these various organs that are affected by lead exposure, at what blood lead levels would adverse effects have been shown to appear?

A That's very difficult to say because in my opinion, scientific opinion, our current understanding of the mechanism of lead at the cel'uiar level would suggest that many of these effects, there is no clear threshold, and, in fact, what we discern as a level at which an adverse effect may be associated relates very much to the decision of our ability to measure it.

For instance, looking at the neurotoxic effects of lead which is an area of considerable study [15] over the past three decades, it's quite clear that our understanding of where adverse effects, that is, measurable detriments in brain function occur has been moving downward very very rapidly from levels in the area of 60 to 80 μg/dl blood lead which were considered to be associated with emcephalopathy and neurologic disfunction. Those were the levels that were talked about in the 1960's. In 1970's people began to consider the levels at 50 and 60 would also affect the brain and the peripheral nervous system. It's now, on the basis of studies by Baker and Hanninen, fairly clearly changes in mood can be seen in workers with blood levels in the range of 30 and 40.

As I said, when one explores the mechanisms of the effects of lead on the brain which has been in the area of my research, it is not clear that there is any threshold for these effects. Lead is a totally exogenous element. That is, it has no known function in the normal physiology of mammals including humans, and, therefore, any presence may have the potential to derange their function, particularly of essential elements such as calcium, sodium magnesium in the brain.

[16] Q What about in terms of the other organs that are effected?

A In terms of heme synthesis, again, based on our ability to measure it, again, the effective threshold based studies by Piomelli and others would be somewhere in the area of 7 to 10 μg/dl. This would relate both to the effects on the liver and the blood forming organs.

With respect to effects on the reproductive system, again, because of lead's effect on the liver, a derangement in neuroendocrine metabolism, since the liver is the main organ which metabolizes sex steroids, those may occur again at the same levels at which heme synthesis is deranged in the level of 7 to 10 μg/dl.

In adult males effects have been observed in levels as low as 25 to 35, with a relative lack of precision of dosage, and in females, levels, perhaps, of the same order, 25 to 40 one might expect to see effects.

In terms of increased spontaneous abortion, those studies which have been done in animals suggest that it takes a relatively high dose to cause failure of [17] implantation in spontaneous abortion. In terms of fetal toxicity, that is, the sensitivity of the embryo or fetus to lead, there is no evidence as yet, in my opinion, to suggest that the fetus is more sensitive than the postnatal child, so that levels of sensitivity for the fetus in terms of the neurologic development or organ development is probably similar to that of a child in the range of 10 to 25 μg/dl.

Q Let's go back. You talked about Heme Synthesis in terms of 7 to 10 micrograms.

A Right, but I want to state again very clearly in my opinion there are no clear thresholds for any of these effects of lead. These are the levels at which adverse effects have been noted with statistical significance in clinical studies. However, there is no reason to assume that below these levels for any particular organ system there would be no effect.

Q What is the general level of the population in Washington, D. C.? What is your estimate?

A In Washington, D. C., based on the Hanes II survey I would estimate that the median blood levels of this population are probably around 14 μg/dl. The [18] median for the U.S. as a whole is between 10 and 12, depending upon age, sex, race.

* * * *

[21] Q You made a statement that in your opinion the fetus at least at this point is not evidence that it is any more sensitive in the young child.

A That's correct.

Q Is the young child any more sensitive than the adult?

A The young child in terms of the nervous system impairment may be more sensitive than the adult.

Q Why is that?

A There are probably two reasons for stating that. One is unconnected with lead. Our knowledge of the prenatal and postnatal development of the brain suggest that the human brain, since it is still forming during the last trimester and in the first six years of postnatal life, is quite sensitive to the influence of aminobiotics of all sorts including lead. Moreover, since the brain is not capable of cellular repair, any damage, [22] in fact, being irreversible or difficult to compensate for.

In addition, more specifically related to lead, thee is evidence that the young child absorbs more lead per given dose and, in fact, more of that lead may reach the brain that in the adult. However, when I say that recent information on the effects of lead on the heart in man, adult men, may cause one to revise this opinion that the young child is more sensitive because increases in blood pressure and risk of hypersensitive heart disease have not been described in men with blood lead levels in the range of 10 to 20 μg/dl.

Q What studies are those?

A There is a series of studies published by Pirkle and Colleagues, 1985.

Q In terms of the young child, at what blood lead levels is there an indication that there is an adverse effect on the nervous system?

A Certainly in my opinion blood lead levels between 10 and 20 μg/dl.

Q On which studies do you rely for that?

A Primarily studies by Needlemam and Colleagues as [23] well as Lansdown, Winneke, Odenbro, Otto and a large number of other studies in this area.

Q Any of those relate to the fetus rather than the young child?

A One of the most recent studies by Needleman relates to the fetus as well as the young child. It's impossible to exclude the two, separate the two.

Q What was the Needleman's conclusion in that study?

A This was a recent study looking at children from time of birth and grouping them in terms of cord blood, that is the amount of blood in the fetal circulation measured at term of birth, and he did report decreased learning ability, behavioral changes as measured by appropriate tests for infants which had been observed in these infants now from, I think, three months now through 18 months. The most recent being by Ballinger and Needleman which are correlated with blood lead levels.

Q What is the blood brain barrier?

A Blood brain barrier is physically probably the capillary endophelial cells which surround the small [24] capillaries of the brain forming very close junctions, cell/cell connections which obstruct or prohibit the entry of relatively large molecules into the brain.

Q Would it protect the brain from lead absorption?

A It does not appear to in that proteins which transport calcium which resembles lead in being a divalent catti. Apparently those same proteins will transport lead as a facilitated transport. They do inhibit or prevent the free diffusion of lead from the blood into the brain. There is a facilitated transport mechanism which can, if you will, be fooled into taking lead across.

Q When is the blood brain barrier formed in the human body? Is it there from birth?

A It's there perfectly from birth as far as we understand. It is certainly fully in place by approximately 10 years of age, but functionally it is partially in place by birth, yes.

Q Would the absence of the completed blood brain barrier be reason to believe that greater amounts of lead would enter the brain in the young child than the adult [25] A I don't think so. It used to be, but I think now it's probably because the immature brain is taking up calcium more rapidly than the mature brain, and that it's a difference in the rate constance of the calcium transport system that influences the more extensive uptaking of lead by the immature brain rather than the incomplete blood brain barrier. That used to be the dogma, but I don't think it's true any more.

Q What you are saying the result is there but the cause may be different from that you originally believed.

A That's correct.

Q There is a greater amount of lead entering the brain of the child.

A There is still a greater amount of lead that enters the brain of the young child, but probably not because of this blood brain barrier, which is what people referred to five years ago.

Q You referred to the development of the brain during the last trimester of pregnancy.

A That's right.

Q What are the dangers to the fetus of lead [26] exposure or lead absorption during the first two trimesters?

A Very early in pregnancy, really physiologically before pregnancy can be said to even begin, relatively high doses of lead, at least in animals, have been shown to interfere with the implantation or the attachment of the fertilized egg to the womb. Again, relatively high doses of lead in the first trimester can cause spontaneous abortion of an embryo.

In terms of other risks to the fetus during relatively early exposure, these seem to be very unclear. Lead does not appear to cause structural abnormalities in mammals. It can cause terata, that is, structural defects in chicks, but it is not, in my opinion, a classic teratogen, morphologic teratogen in mammals. It is difficult, I would point out, to make clear separations in early and late terms exposure of the fetus to lead because of the long residence of lead in the body. That is, a woman may be exposed to lead early in pregnancy and deficits noted in the child after birth, but those deficits might have been associated [27] with the on-going exposure which occurred in the late stages of pregnancy rather than the late stages.

Q When you talk about on-going exposure, would you be referring to the environmental exposure or the internal?

A I'm referring to the internal exposure.

Q Even if the woman were removed from the environment of lead exposure, there still would be exposure in the later stages in pregnancy of the fetus.

A For all purposes there is a continuing exposure to lead even after removal from sources of lead, yes.

Q How long does that continued exposure last after removal?

A If it were possible to take a person into a lead-free environment after an episode of exposure, the turnover of lead is probably in the order of 100 days. So within a year or so there would be a reduction in lead.

There is also, of course, a rapid removal of lead from the blood into the bones in soft tissue that is no longer available for circulation. But considering [28] that most people are not removed to lead-free environments, even if they go from areas of relatively high exposure to lower exposures, there is continuing cyclic and exposure to lead. That was certainly my observation in looking at the records from the secret service.

Q When you talk about continued exposure, that would be even if they were removed from any occupational exposure.

A That's correct. All persons in this world are continually exposed to lead.

Q Let's go back to the study that you mentioned concerning the damage to the male reproductive system caused by lead.

A Yes.

Q In that regard you first of all talked about the heme synthesis effect on the liver which then had an effect on the reproductive system. Could you elaborate on that?

A This primarily effect the on the sex steroid metabolism. The liver is the major organ which metabolizes the endogenous sex steroids. The metabolism [29] of sex steroids is a heme dependent process; that is, many of the enzymes and co-factors involved in steriod metabolism contain heme. If there is an inhibition of heme synthesis, which is one of the primary biochemical regions of lead, then all functions dependent upon heme, all biologic functions are effected, then one of those has been shown here as well as in a wide range of animal studies including some of my own is hepatic metabolism including those pathways which metabolize the sex steroids such as testosterone, estrogen. That would be one of the major mechanisms by which blood would effect reproduction in both sexes.

Q What would be that effect actually?

A That effect appears to be decreased levels of circulating testosterone and a change in the sensitivity of testosterone receptors in the gonads. Work on receptors has been done by Thomas and Brogan, published in 1982.

Q What is the effect of that?

A The effect, essentially, was to reduce the rate at which sperm mature and are produced, so the functional effect would be eventually infertility in [30] men.

Q Would that be a permanent effect?

A If the lead is there permanently, yes.

Q If the individual were removed from the high lead environment and going back down to a lower level, would it be reversible?

A It might be. It's unclear whether or not the lead would then be removed from the liver and also from the gonad itself. Lead can obtain entrance to the male gonad and, in fact, effect steroid metabolism in the gonad itself.

Q Is it possible to measure the effect on heme synthesis?

A Yes.

Q How would you do that?

A There are several ways. You can measure the circulating blood cells. And, in fact, one of the standard clinical tests for lead exposure for measurement of ZPP, FEP, technical known as protoporphyrin-9 is a measure of heme synthesis in the red cells.

One can also measure the status of hepatic metabolism which was done by Alvares by administering a [31] standard agent such as antipyrine and measuring its clearance in the body by taking serial samples in the blood. That is a standard clinical measure of the status of liver metabolism, and what Alvares has published is that lead exposure didn't heme metabolsim was measured this way in humans and men who were occupationally exposed to that.

Q If these tests for effect in the heme synthesis were performed and showed no effect, then I assume there is no effect in terms of the reproductive system as it relates to the liver.

A No, because the ability to test hepatic metabolism in this manner in humans is very sensitive. It would not be a clear cut answer that liver metabolism was unaffected by any experience, lead or otherwise. It's a very gross measure, and, in fact, if a significant increase or decrease in antipyrine disappearance occurs, then you really have a major effect on liver metabolism. It's not a sensitive measure.

Q Certainly, as the ZPP shows, that there was an effect on the metabolism you would have a greater [32] concern.

A The ZPP effect, yes. That's if you will, a measurement of an analogous compartment. You are measuring now the effects of lead upon heme synthesis in the red, cell not in the liver.

Q Would you expect a similar response in both places?

A Yes, I would. In fact, research would suggest that the liver and kidney are very sensitive to the heme pathways in those organs are very sensitive to lead one can take them out of the animals and look at them.

Q What is the test for ZPP that is actually referred to as ZPP?

A Yes, it can be called a ZPP test. Hemotometer test it is sometimes referred to.

Q If that test were performed and showed no effect, whatever the blood level might be, would that also indicate to you there was no effect on the liver as well in heme synthesis?

A Before I think one can completely exclude that possibility, I think it would tend to suggest that, but [33] before you would completely exclude that possibility you would have to know the history of lead poisoning first.

Q But if one were testing on a regular basis for ZPP, assuming the history were also available, would you be able to test for the effects on the reproductive system as it is caused by the heme synthesis effect on the liver?

A Not completely, no. You are measuring an analygous compartment. Again, I should point out most of the instrumentation applied clinically for screening basis is not that sensitive. I can only measure reliably increases in ZPP that are at least two standard deviations above, so it is not as sensitive as actually looking at hepatic heme metabolisms.

Q How would one do that?

A Ideally by doing a liver biopsy.

Q From a practical point of view, on a regular basis that couldn't be done.

A I don't think one would do it on a regular basis. That's why one measures blood lead. You don't biopsy the organs blood effects. You measure internal concentrations and hope to in a preventive fashion keep [34] levels of exposure sufficiently low so that the levels in the site of actual toxic effect are not exceeding unacceptable effects.

Q When you talk about measuring blood lead, is there a difference between blood lead and lead effect?

A Yes. Blood lead is not an effect of lead. Blood lead is a concentration of lead inside the body.

* * * *

[42] Q You originally identified the level at which adverse effects occur to the reproductive system as 25 to 35 ug/dl.

[43] A That's correct.

Q The studies that you referred to, with the exception of Deknudt, all seem to be reporting on essentially higher levels.

A No. I described several mechanisms by which lead could effect male reproduction, and I think you will recall for two of the mechanisms, that is, hepatic metabolism in sex steriods and chromosomal effects, those effects were, in fact, observed at relatively low levels of lead exposure. It was the later effects that we were talking about on hormones on circulating hormone levels and sperm shaped where the effects have been described at relatively higher levels.

Q Getting back, so I understand, the effects at the relatively low levels are what?

A Are primarily effects of hepatic metabolism on steroids and on chromosomal integrity as measured in lymphocytes.

Q The studies that you rely on in respect to each of those effects?

A With respect to the hepatic metabolism, there are a large number of animal studies, including my own [44] work, and the studies in humans are primarily the studies by Alvares.

Q In terms of the animal studies do we have a way of equating the blood lead levels from the animals, studies to humans?

A Probably not extremely useful to equate blood lead levels but rather to look at a comparability of effects. In animal studies, again, were you can take tissues out and study them, alternations in hepatic metabolism occur relatively rapidly and can be associated with blood lead levels in rate of 15 to 20 UG/DL.

Q From that can you conclude that levels of 15 to 20 UG/DL in humans you would have similar effects?

A It would be hard to say, but I would conclude that based on the knowledge of the sensitivity of that pathway to lead that the effects would start to occur at very very low levels of lead exposure. This is a very sensitive system and one of the first to respond to that.

The liver accumulates a great deal of lead in adults and children after exposure, so there is no reason not to expect the effects starting to occur on a [45] linear basis at very low levels of exposure.

Q In terms of the chromosomal activities as measured in lymphocytes, I believe was your statement.

A Yes.

Q What studies did you rely on?

A Deknudt and Schwanitz. As I said, there are others that are now confirming these effects.

Q Do you recall the names of any of those?

A Bainio, and I think that's it. That is the one I can recall at the present time.

Q The Deknudt studies is the one we discussed in 1977.

A Yes.

Q How about the Schwanitz studies?

A Schwanitz is very similar. I think it was published in 1978.

Q What was the nature of that study?

A Again, looking at the population of workers and looking at lymphocyte and chromosome status.

Q At what level?

A I think Schwanitz may have collected some people down as low as 35 UG/DL.

[46] Q What did he conclude with respect to that level?

A That there were significant effects of the frequency of chromosome abberation.

Q What are the consequences of those effects?

A As I stated, the consequences of those effects are generally considered by biomolecular biologists to either be associated with increased risk of cancer or increased risk of heritable genetic disorders, infertility and fetal death.

Q Would that be just in the males?

A That's all they studied were males.

Q Would there be reason to believe there would be a difference in females?

A Not that I know of, but as far as I know no one has ever looked at lymphocytes and chromosomes in females.

Q I believe the other study you mentioned was Govoni.

A It's a very similar study of smelter workers, I think were studied. Part of a long series of investigations that Govoni has been doing looking at [47] exposure in the industry and alterations in chromosome integrity.

Q At what levels did he study?

A I don't think those were reported, but I would say that these are studies done in Finland, and if you look at data from Seppalainen and Hernberg who have been studying the same industry in Sweden, the blood

lead levels in those industries are very low, in the order of 20 to 30 UG/DL. The Fins have had very stringent controls on lead exposure in industry for quite some time.

Q Going back to the hepatic metabolism, would there be comparable or similar effects in females?

A There may be.

Q Any reason to believe it would be different in males than in females?

A Yes. I have data on animals which suggest there are differences between males and females in that the females are much less responsive. These are rats.

Q In terms of the Alvares' study, which is the one you referred to there, what levels are we talking about?

A I believe the blood levels, they were [48a] relatively small studies. I think it was demolition workers who were exposed to lead through welding primarily and I think the levels were in the order of 45 to 60 UG/DL.

Q When was the Govoni study?

A The first study was done in 1979. Govoni has written a book which summarizes most of his data which was published, I think, in 1983.

Q Going back again to the fetal exposure. In the very early stages of pregnancy you indicated that relatively high doses of lead can interfere with implantation and spontaneous abortion.

A That's correct.

Q Any other effects that you believe occur from exposure to lead in the first two trimesters?

A I don't think so. I think the effects which have been observed are related to late stage exposure.

Q How about central nervous system effects?

A Those are primarily related to third trimester at the point in which the complex development of the nervous system occurs.

* * * *

[49b] BY MR JASPAN:

Q Going back to my last question, I didn't get your entire answer. Am I correct that there is some development of the central nervous system during the first trimester?

A Yes, in the sense that all cells of the body are derived from the primordial cells, yes, but lead doesn't appear in those stages of neural crest? Development but rather with the period of synaptogenesis in complex differentation of the nervous system as far as I know.

[49] Q What generally were your conclusions with respect to prenatal exposure in those studies?

A Our general conclusions were that the effects of lead prenatally were very similar to the effects postnatally.

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[50] Q With respect to the central nervous system?

A With respect to the central nervous system, correct.

Q In generally what are the effects postnatally?

A To cause substantial irreversible cellular and functional damage to the brain.

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[54] Q Did you identify Terata?

A As I mentioned earlier, with the exception of the chick I don't think anybody has found Terata physical abnormalities associated with lead exposure. Needleman in his most recent paper has suggested an increase in the incidence of minor physical abnormalities associated with cord blood levels, but those may well be markers for the nervous system effects. There is a good degree of correlation between minor physical abnormalities which he described and the nervous system deficit. They are not major structural abnormalities. They are things such as small birth marks, hydrocele [55] and, in a large part, reversible effects which are observed at birth on careful examination.

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[56] Q What has been shown in terms of effects on offspring of exposure of the parent?

A As I stated, with the environmental studies and occupational studies of women, it's important to note that the lead status of their male partner was never determined. In the Nordberg studies which observed an increase in the rates of spontaneous abortion in women living near smelters, these rates were, in fact, even higher in these women's husbands—they were all married couples—who were employed in the smelter. Of course, in all cases, the men were living with the women, so there was co-exposure although the men's exposure was not investigated as thoroughly as the women's exposure.

[57] At much higher levels, as I mentioned before, lead can be an abberation, that is, actually induce abortion during the first trimester of pregnancy. These are at very high levels of lead exposure. Common, perhaps, in pottery industries in England before 1900. Certainly nothing relevant in industry today. I don't think anyone in the world, possibly.

Then the studies by Needleman which would suggest that blood status at birth related to prenatal exposure is associated with deficits in intelligence and behavior in children.

Q Prenatal exposure could be exposure to the fetus.

A That's right.

Q And possible exposure of the adult.

A This was measured as exposure to the fetus by measuring the cord blood which is the fetal circulation.

Q Are there any studies showing the exposure of the adult male has an effect on the offspring?

A Only, I would say, the studies of women which have not looked at the male such as the Nordberg studies where one could recently infer that the men were equally exposed. There have been no studies in which the women [58] were only exposed.

Q Were there any studies showing where only the men were exposed and the effect on the child?

A No. I don't know those have ever been done, either.

* * * *

[66] Q Would you expect similar type results in prenatal fetal exposure?

A No. I'm not sure. Because the specific neurochemical pathway we are looking at is not completely linked down prenatally, so I'm not sure of that.

Q Earlier I asked you this question. What is your answer for those organs you believe to be more sensitive to blood lead exposure. That included heme synthesis, but you named several others.

A Heme synthesis, calcium metabolism including that involved in the brain, the heart and I think I added that these would be the most sensitive systems. Probably also the immune system.

Q The immune system.

[67] A Yes.

Q With respect to each of these, the sensitivity in the child would be greater than in the adult.

A Possibly calcium metabolism, but I'm not sure of that. I'm actually looking at calcium metabolism in osteoporatic women. So I'm not sure of that. I don't know if it would be. I'm not sure of it's an issue of sensitivity. It's an issue of access. More lead is absorbed by the children, but the target site may not be different.

Q You say more lead is absorbed.

A That's true, yes.

Q From the blood into the—

A From the gut into the blood, number one. And there may possibly also be a different distribution of blood once it's in the blood among the various organs in the child as compared to the adult.

Q At a certain blood lead, 25, you might be concerned with respect to all four of these organs in the adult.

A I would definitely be concerned, yes.

Q I assume at the 25 blood lead level you would [68] also be concerned with the child.

A I would be concerned for anybody that has a blood lead level of 25.

Q The concern would be different in the child than in the adult.

A It might be in that the expression may be different. For instance, in the area of calcium metabolism there is data now that suggests that the growth and stature of children is affected by blood levels of that order, 15 to 25. I wouldn't expect that to occur in the adults as the adult's growth stature is through.

We have some data to suggest that lead may exacerbate osteoporosis. With respect to the heart, the only data I have seen relate to adult men, and effective levels as I said in the range of 15 to 25 in the Pirkle studies, I haven't seen any description of the effect in children. I don't know enough about cardiovascular physiology to say this may be age related or just that people haven't looked in this area the same way. The blood pressure in children is so relatively labile that it's impossible to determine [69] whereas it is more stable in adults.

Certainly with the effects of the nervous system, calcium metabolism as it is expressed in the nervous system, I would expect it to be different, at best. Whether one would be more sensitive or less sensitive, I don't know. Dr. Baker and Dr. Hanninen, in their work on lead workers and neurophychiatric function, have found effects at levels similar to those that Needleman has found in children. There are different kinds of effects and not so much effects on learning and behavior as they are on mood and short-term memory, but they may be the same lesion in the brain.

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[70] Q With respect to the child we talked about the central nervous system.

A Yes. We talked about calcium metabolism, too, in terms of growth and stature and osteoporosis.

Q Okay.

A And we talked about the heart in which I said I didn't know anything about the sensitivity of the heart in the child, there there is very good evidence now of the sensitivity of the heart in adult man.

Q The damage to the central nervous system in the child, am I correct in understanding it would be permanent?

A Damage to the central nervous system in any human is permanent because the central nervous system does not replace itself.

Q What about heme synthesis? Is that permanent or reversible?

A Theoretically it should be reversible in that it is an effect on enzymes which can be resynthesized; however if lead continues to be present the effect persists as long as lead is there.

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[72] Q Are you familiar with the fetal protection of policy of Johnson Contols?

A I have read it.

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[74] Q Is there reason to treat the fetus or the small child different than the adult?

A There may be, but only at blood lead levels below 10.

Q You are saying that everyone should be about 12, and then you can talk about finer distinctions.

A Exactly. I think there may be, based on Needleman's data, reason to suspect that the fetus may be sensitive to blood lead levels as low as 6, so if we reach the happy point at which we can talk about those levels existing in this country, then we can talk about differential protection of the fetus.

Q If I understand your position, everyone should be below 12.

[75] A That's right.

Q And then—

A That's not just my position, but the position of the public health service and EPA.

Q That everyone should be below 12.

A That's correct.

Q And then we could possibly talk about finer distinctions in the fetus and the adults.

A That's correct.

Q The small child and the adult.

A That's correct.

Q But any policy that doesn't aim at getting everyone below 12 you find inadequate.

A It's difficult to find a distinction. For instance, based on the Pirkle data, there is very substantial risk of hypertensive heart disease which, after all, heart disease is the number one killer in the United States. There is a very substantial increase in hypertensive heart disease in the adult man with blood lead levels between 15 and 25. I don't see why one is ignoring that risk to men and focusing, say, in this policy, on the fetus.

[76] Q Concern with the heart is the Pirkle study?

A Yes.

Q When was that published?

A That was published in 1985.

Q According to that was there any studies showing the concern for the heart?

A Yes. There were a range of studies but there was never a study of having the advantage of looking, number one, at such a large population, and, number two, at levels that were so low, and, number three, being able to control all the other risk factors for cardiovascular disease. This is part of the data developed by the national health and nutrition examination survey conducted from 1976 to 1980 of the U.S. government. In my opinion, this is a major epidemiologic study conducted on thousands of men, women and children, and not only did it investigate lead status in the general population but also looked very specifically by design at a number

of risk factors for diseases including the so-called Framingham risk factors for cardiovascular disease.

So in the analysis Pirkle was able to separate [77] those risk factors out and show the major role of blood lead elevation in increased risk.

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Q I assume you are familiar with the CDC 1985 statement on blood poisoning in children.

A Yes. I was part of the committee that worked on that.

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[81] Q Assuming that you were advised by those that [82] are experts in occupational hygiene and engineering controls that it would be impossible to accomplish at least at this stage, would you disagree with the treatment of the fetus in providing extra protection for the fetus which may not be provided to the adult?

A I don't think that it's extra protection. I think that at these levels everyone is at very severe and significant risk, male, female or fetus. So I don't see any protection being provided here.

Q But you would agree, then, that even in walking the streets of Washington, D. C. all three categories of people would be at risk.

A They are clearly at risk, but this is of a more excessive risk you are talking when you are talking of blood lead levels of 30, 20, 29, 40. These are levels in terms of biomedical, in terms of huge excesses for all three organisms. So it's impossible for me to decide whether it's worse for a child to be born with some neurologic detriments or a man to have hypertensive heart disease. I can't make that choice. I wouldn't know what I would choose. I have children. I have a husband. I don't know which one I am going to knock [83] off.

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[99] Q How do we measure blood lead levels in the fetus?

A As far as in know, knowone has measured blood lead levels in the fetus. It is possible that with nuclear magnetic spectroscopy that it could be done.

It is also possible, people are measuring fetal circulation now for genetic diseases, and it could be done. There is no barrier to it.

Q Is there an indirect way that is done by using the mother's blood level?

A I don't know how that would be. You can measure the mother's blood lead level.

Q Isn't it assumed that the blood lead level of [100] the fetus is similar to the blood lead level of the mother?

A It has been assumed, but there is actually very little data on the subject, and there is other data that would not be the case.

Q Which data is that that would suggest that would not be the case?

A Barltrop, Wiberly, Delves. I just reviewed this whole literature for a paper in the press. There is a range of studies that have looked at this, and RYU. It's not clear that maternal blood is an indicator of fetal blood of that concentration. That has been kind of a dogma statement, like the blood brain barrier statement, but it does not appear to hold up too well upon examination.

Q Aren't there also statements that support that?

A Very few.

Q Needleman?

A No. Needleman did not measure the mother's blood lead level at the same time they measured the cord blood level. That is not what they are saying. The [101] Needleman and Rabinowitz study of cord blood levels. That is not the fetal side. As a matter of fact, I talked to her about this because those levels are very low, and they would suggest that fetal blood leads are lower than maternal. If you recall this paper I the Journal of

American Medical Association, the blood leads in the cord blood, he had leads found at two, one group goes from two to seven, and another goes from eight to nine. These are levels based on the national survey that are very, very low particular for this population of Boston women he has been following.

He did not measure the blood lead at the same time, and I think it would be very interesting to know what the mother's blood level would be. * * *

* * * *

[102] Q We talked about blood lead and we also talked about lead effect. I assume it is much more important what the effect of the lead is than the actual quantity.

A Obviously, one expects them to be correlated, at based on a general dose response there is a theories of toxicology, but what we are interested in are the effects of lead.

* * * *

[EXCERPTS OF LEGATOR DEPOSITION]

(Jones Aff., Ex. C)

[11] A. There are very few chemicals that we know of, perhaps you can count them on the fingers of one hand, where there is evidence that would indicate the exposure to the male has an effect on spermatogenesis which can then be transmitted to the progeny, to the F-1, the children.

And DBCP, although we don't know in terms of the transmission of genetic damage, is certainly suspected of doing that. Vinyl chloride is a chemical that, again, as far as we now know, can increase spontaneous abortions and lead falls into this group of chemicals that has an effect as far as we now know from the literature, on spermatogenesis.

* * * *

* * * The literature on lead—first of all, let me preface my remarks by talking a little bit about our human studies, what we can and cannot do and probably the big emphasis on what we cannot do in human epidemiological studies.

* * * *

[13] Probably in terms of our epidemiological studies as to transmissible genetic damage, the only information that we can generate, because it's something that we can get to fairly easily, although it's pretty damn inexact, is an increase in spontaneous abortions.

[14] And an increase in spontaneous abortions is somewhat comparable to tests that we can run in animals where we get a reduction in litter size, or where we get a failure of the conceptus to develop, these kinds of things.

So, given all that, the reason I went through this long lengthy description, is to indicate how difficult it is to get this cause and effect in people when we talk about male-mediated damage effected during spermatogenesis. And in the total sum of literature available on this area,

we know of very few compounds that can indeed or allegedly seem to cause effects in the progeny when the male is exposed.

And to be directly responsive to your question, in terms of lead which is one—which forms as one of the members of this very select group of chemicals, and I think I can tell you very quickly the chemicals that we suspect or have evidence of male-mediated effect would be lead, dibromochloropropane, kepone, vinyl chloride and possibly anesthetic gases. That's the sum total of chemicals that we know of where there is information about the male-mediated [15] effects.

Now, there is a variety of studies with lead that go back to about 1860 actually, that would indicate an increase in spontaneous abortions from male exposures. Now, again, the male—and I can give you—I have the references with me, and I can just read them off very quickly.

In 1930 there was a study by Torelli, where he found an increase in abortion rate. As I recall that study, it was about a three to four fold increase over control. There was another study in 1905 by Tardieu, in lead workers where, again, he found an increase in spontaneous abortions.

There was a study in 1905, by a Frenchman, Rodeaux, who found, again, an increase in abortions. And we have some fairly current studies that were, in 1975 to 1979, where, again, we have shown an effect in terms of fertility and sterility on male workers. And my major interest here is male workers.

Q. What were those studies in '75 to '79?

A. That's the Lancranjan studies which I am sure you are familiar with. I have a copy of it with me. [16] Now, so that kind of warms the constellation of studies that we have in humans.

And I think it's fair to say that when we look at spontaneous abortions, this is not a very satisfactory end point. And the reason it isn't the satisfactory end point is because we are looking at lethality. And from a gentic

point of view, lethality, of course, is the end and we are no longer interested in it because that's it in terms of transmission.

But I think the thing that one has to keep in mind, is that for compounds that produce spontaneous abortions at one level, okay, at substantially lower levels one would anticipate a variety of adverse genetic effects.

So, when we talk about spontaneous abortions, we talk about sterility when we are talking about effects directly on the sperm. Then one would suspect that at lower levels, we probably would find the viable transmissible genetic damage.

So in some respects, and we have been through this with dibromochloropropane, in some respects, the higher concentration that leads to lethality of the embryo, is probably of [17] less concern than lower concentrations where you get viability and genetic problems.

Q. Are there any studies that indicate with respect to lead, specifically, those problems?

A. Yes. Yes, there is. In fact, the lead studies started a whole area of research, as far as I was concerned through my own personal deal, and—first of all, in the animal studies there are a number of studies which are comparable to what we have seen in the human population in terms of reduced litter size and all this kind of stuff.

An interesting study by Brady and Zenick is another author. I do have the reference with me and I'll leave that with you. This was a fascinating study because it was one of the few that I think were attempted to look at the possible adverse effect on viable progeny. And what these investigators did, is they administered the chemical, lead, to males only, females only, or both. Okay? And then they did a series of tests on the resultant progeny.

They exposed the males or females, mated them, and they they looked at the offspring. And what they found was that with the lead exposure for males only or females only or [18] both together, that they showed a behavioral

anomaly as manifested by one of the tests that they used which is one of the fairly standard tests that behavioral toxicologists look at, and that's swimming tests. It was in rats, as I recall.

* * * *

[19] And another piece of evidence that would indicate that with lead, we are specifically talking about a genetic effect, would be the ten—well, actually let me say that there are about fifteen or sixteen cytogenetic studies that have been done with lead in humans. That's, you know, this chromosomal work I talked to you about earlier. And we now have ten positive studies that would indicate that lead in occupational exposures, caused chromosome damage. So, if—

Q. That's in humans you are referring to?

A. Yes. This was in humans. This is one of the things that we can do. It's not a transmissible genetic damage, but it's one of the things we can do.

So, given the sum total of information we now have, I think one would have to conclude, and there is a number of experts that are far greater experts than I in lead [20] toxicology, who have also concluded that lead has a male-mediated effect, that lead affects spermatogenesis.

And this is given the severe limitations that we have on experimental studies both in animals in this difficult area of toxicology. And then one further thing, of course, that's always of interest is when we talk about spermatogenesis, we are talking about a very active process of cellular division. And we know that with most of our chemicals and radiation, that the dividing cells during the spermatogenic cycle are quite susceptible to chemical damage.

So, putting the whole thing together, humans, animals, including cytogenetic information we now have, I think that one would have to conclude that lead is one of the very few chemicals and probably one that has been studied to a great extent, that probably causes a genetic lesion during spermatogenesis.

* * * *

[25] Q. But that we don't know for sure at this point?

A. Well, we have animal studies and by the only criteria that we have been able to generate in human studies —by the only criteria we have been able to generate in human studies, we find, indeed, that lead gives us that indication that we can measure.

* * * *

[47] Q. Again, going back to your familiarity with the literature on lead. Are you in agreement that whatever level is dangerous to the human—appreciating the individual variability—that the children, the young children are even more sensitive to lead than are adults?

A. No question about it. Certainly. I am in total agreement with the sensitivity. In fact, I don't think we have even been able to reach that concentration that one could say has no effect on kids at the present time. If you look at some of the recent work, there is no question about the sensitivity of children to lead, no question.

Q. Greater than the adult?

A. Sure.

Q. Why is that?

A. Huh?

Q. Why are children more sensitive?

A. Possibly because we are talking about [48] developmental systems, we are talking about fast growing cells, we are talking about the difference of deposition and mobilization of lead.

There are three places, three pools, really, that lead is accumulated in. One is the blood, very short term accumulation here; the other is in soft tissue, intermediate. And finally it's in the bone deposition.

And when you look at developing children, I think you have a rapid turnover, and one would anticipate that with something like lead, you probably would get some serious adverse effects, and that's what our current literature would indicate. There is no question about children being very sensitive to lead.

Q. Whatever standard might appropriately be set for adults across the board in terms of the body systems, that even a lower standard if one were setting one, would have to be set for population of children?

A. Well, from—let me preface this by saying: From what we now know, it would certainly seem that children are far more sensitive. On the other hand, we are talking about unfortunately [49] great areas of profound ignorance.

For instance, I could not tell you on the basis of the literature, I could not tell you, what would be a safe standard in terms of male-mediated effect. I don't know. It could be in the area of what we see as affecting children or it may be significantly higher, I don't know.

But, certainly, on the basis of the information we now have, epidemiological, recent vintage, you know how recent some of those studies are, within the last several years, we have very serious concern for the effect on children. If this concern should be transferred to other areas of toxicity, I don't know, but we certainly have the indications that children are very sensitive to lead.

Q. And extrapolating further, are you in agreement with those who conclude that the fetus, in utero, would be as sensitive or even more sensitive than the small child to lead exposure?

A. Again, there is no question about the sensitivity of the fetus. There is no question about it. I mean, I don't think one could argue about the fact that lead affects the fetus.

Q. At least based upon our current knowledge, [50] appreciating what you described as a tremendous amount of ignorance—

A. Yes.

Q. —that the level that would be set for fetal exposure in utero, would be lower than generally might be appropriate for an adult? Based on the current literature and based on your current knowledge?

A. Yes. But what I am trying to say, as we have—you say indications—there is no question about, you know, the effect on children, the effect on the fetus.

We now have indications of the effect on the male. And I don't know how the three would compare at the present time. So, I'd say that there is no question about the high sensitivity of the fetus to lead toxicity in young children.

As far as the male-mediated stuff—how sensitive is the entire process of spermatogenesis to lead? I don't know. The only thing we can say right now is we know from all indications we see, that there is a problem. I can't give you the rank order, unfortunately.

Q. Let's talk about what we do know. Lancranjan's [51] lowest level at which he found any type of effect was the 42 microgram average group?

A. Yes. But the problem there, as I tried to indicate, we only see gross abnormalities in the sperm, okay? When I talk about transmissible genetic damage, I'm talking about perfectly normal, as far as we can see, sperm, that have a genetic lesion that was induced in the stem cells which is later manifested by abnormalities such as behavioral anomalies.

Let's face it, in our population right now, over one third of the mentally, retarded are there because of genetic reasons. What percentage of that is due to chemicals, I don't know. But it's a tremendous background rate we have of that. And, you know, who is to say what part lead plays in that, because lead after all is in our everyday environment.

So, when we look at the studies that we now have with the insensitive indicators that we now have, then one would—from what we know about the relation of concentration times exposure equals effect, from what one knows about that, one would expect effects substantially below what has currently been studied in these [52] epidemiological studies to indicate the transmission or genetic damage to viable—

Q. We have no studies that indicate that yet?

A. Oh, yeah, we do. We do. We have the study of Brady in animals is one where we have indicated a behavioral deficit right there. Sure. Male mediated. We do.

Q. We have the studies that indicate the transmission through the male—

A. That's right.

Q. —of the problem. I'm talking in terms of levels in humans, that's what I am referring to at this point. We don't have the studies that would indicate at what level?

A. And we probably never will have because of the very nature of the problem. Now, you see, this is kind of—we have almost the same kind of discussion with dibromochloropropane.

With DBCP we had substantial information about the fact that this chemical at five parts per million caused testicular atrophy in a variety of animals. The study was generated in 1963. And basically we ignored the animal data, until the workers found ān effect themselves in 1977.

[53] So, one of the problems I think that we often have in this field where we are very limited in what we can do in people because of the very nature of the problem, is we simply have to use animals as our surrogate, as our indicator of potential toxicity. And based on that, we're a little bit worried about the effects of lead even at very low concentrations.

* * * *

[59] Do you have a disagreement with this policy to the extent that it provides or isolates out those women capable of bearing children from the rest of the population? Recognizing that the desirable end would be to reduce the entire population to a level lower than the OSHA standard.

But to the extent that that's not technologically feasible, do you agree with the concept based upon the known

evidence, that isolating out this population, makes sense?

A. Let me respond to it on a very personal level. If I had a daughter of reproductive age, I would not want her to be exposed to any concentration of lead in the work place that, you know.

[60] If I had a son of reproductive age, I likewise would not want him to be. So, what I, you know, stated before is that it looks to me based on the information that we have, that the process of oogenesis, spermatogenesis, are sensitive to lead. The amount of sensitivity is yet to be determined in all cases. And, therefore, I would like to see every precautionary measure taken, if at all possible, to limit exposure to both groups.

And I don't really at the present time have enough information to really weigh the comparable sensitivity other than to indicate that I think it's bad for both.

* * * *

[63] Q. Am I correct in understanding that the literature does know with better certainty the levels at which the small child, and by extrapolation, the fetus, is in danger?

A. Right.

Q. Well below the current OSHA standard?

A. Exactly.

Q. And, certainly, you would agree that the knowledge of those safe or unsafe levels, if I can use that terminology, are well-documented and known with respect to the fetus and the small child; whereas, when we are dealing with the spermatogenesis type problem, we are still dealing, based on current literature, in an unknown in terms of the precise levels?

A. I would agree with that statement. I would certainly agree with that statement.

* * * *

[64] Q. Now, the basis upon which you conclude, as you have, that spermatogenic effects are experienced under the current OSHA level, based primarily on the Lancranjan study; is that correct?

A. No. If we look at the sum total of studies that go back to 1860, where we see that male exposure [65] lead to spontaneous abortions, okay, then we'd have to look at that, plus, the Lancranjan study.

But spontaneous abortions stand out even to a greater extent than what Lancranjan found, because in the spontaneous abortion bit, we had the developing conceptus, okay, growing to a certain level, and then dyin

So what we had here was a population of sperms that were able to penetrate and are able to generate the development of—the initial development of the fetus. And then later on, we got reabsorption which resulted in spontaneous abortion. Now, that kind of effect, okay, one would anticipate that that kind of effect is indication of genetic damage where we have affected the stem cells and was later carried over.

* * * *

[66] So, you know, you have a spectrum in terms of adverse effects versus concentration. And what we now have with lead in the human population, we have the abnormal sperm, we have several studies on spontaneous abortions, and that's as far as we can go in human studies.

We simply do not have the techniques now because of a high background rate, noise level, to see if indeed, the kids of lead workers, in this generation or subsequent generations are mentally retarded or what have [67] you. We just don't have the wherewithal to do that kind of study.

But what we do now see then, is the things we can measure in people plus what we can do in animals which would indicate transmissible genetic damage. If you relate that to concentration, you can see that what we can measure in people is at a much higher concentration than the kinds of things that we can't measure, and where we have to rely on animal data.

* * * *

[71] Q. * * *

I understand that you gave us a long list of studies earlier that support your position that, in fact, lead causes spermatogenic—I'll get these words right, eventually—effects.

But I am focusing specifically not on the general proposition, but on the proposition of evidence currently available as to what level this is likely to occur, and particularly the conclusion that it's likely to occur at levels well below or below the current OSHA standard. And on that, you say the [72] Lancranjan and Braunstein, I guess?

A Lancranjan, primary. And the other part of the concentration question has to look at the animal studies where we can do measurements that we can't do in people. And only then do you reinforce what we see in the limited, very limited human epidemiological studies; so, we reinforce that with our animal data. But we carry it one step further where we show that there indeed is a male-mediated effect on spermatogenesis which should give us progeny with some deficits.

Q. But in terms of a level, we are focusing on a level —we can't equate the exposure level in animals to the exposure levels in humans?

A. The only thing one can say is not certainly—quantitatively, we can't do that. But we can say that from what we can see qualitatively, we know that the levels that cause the deficits in the progeny were substantially below those levels that would adversely affect the outcome in terms of lethality such as reduction in litter size.

Q. Any other studies just, again, so the answer is complete on the transcript, with respect to this issue of a level? Braunstein, Lancranjan, and [73] the animal studies indicating, as you refer to them, as qualitatively that the levels at which there would be that spermatogenic effect would be lower than the levels that reduce litter size on the other data?

A I believe at the present time that's all I am aware of.

* * * *

DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT

(Jones Aff., Ex. D)

* * * *

INTERROGATORY NUMBER FOUR. For the entire Battery Division of Johnson Controls, Inc., state the total number of lawsuits brought by or on behalf of the offspring of employees or former employees from 1976 to the present which lawsuits are or were based on claims of physical or mental injury to such offspring which resulted from the exposure of their mothers to lead in a Battery Division facility.

Answer

None.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

SILVERSTEIN AFFIDAVIT

* * * *

3. There is an extensive body of scientific literature that indicates the various risks of harm to adult men and women as well as their offspring and a developing fetus resulting from lead exposure. In my work I have been required to regularly review and evaluate the literature in the area of the toxic and other effects of lead on human beings.

4. Based on my work and review of the literature, there are scientific studies of both humans and animals that indicate an association between lead exposure and an increased risk of harm to human organic systems, including the brain and central nervous system, peripheral nerves, reproductive systems, kidneys and blood forming organs. There is also evidence of an increased risk of carcinogenic effects associated with lead exposure. On the basis of the animal and human studies it appears that the toxic effects of lead exposure on the reproductive systems of adult men and women include an increased risk of damage to the testes, ovaries and the germ cells (ova and sperm). On the basis of the animal and human data, damage to the male can include malformed and dysfunctional sperm, chromosomal damage and aberrations and testicular damage.

Defects in reproductive function that are associated with lead exposure include fetal death (spontaneous abortions and stillbirths), sterility, low birth weight, birth defects as well as developmental ab-

normalities in offspring. Some of these risks can be associated with blood lead levels in adult males and females as low as 20 micrograms per deciliter of whole blood. In my medical opinion there is insufficient scientific evidence to conclude that the fetus or offspring of lead exposed men are not at risk of damage to their central nervous system, including learning and behavioral capabilities. There is no scientific basis to conclude that the reproductive risks experienced by males or females are different in severity at equal blood lead levels. There is also no scientific reason to conclude that offspring are at greater risk if either the male or female parent has been lead exposed at equivalent levels.

5. In my medical opinion, the toxic effects of lead exposure on human adults is similar and equivalent in impact to that observed in children at equivalent exposure levels. There is evidence that male and female battery plant workers in Finland with blood lead levels as low as 21 micrograms per deciliter of blood suffer impairment of psychological performance, including such indicators of Central Nervous System disturbances as impaired memory and visual-motor dexterity. (See Exhibit A, attached hereto and incorporated by reference.) There is also scientific evidence of a significant risk of increased blood pressure in adult males and female workers with blood lead levels as low as 11.5 micrograms per deciliter for women and 16.9 micrograms per deciliter for men. (See Exhibit B, attached hereto and incorporated by reference.) Additionally, scientific evidence indicates that there is an increased risk of death from cancer of various types associated with the exposure of employees in battery plant as well as other lead exposure plants. (See Exhibit C attached hereto and incorporated herein by reference.) There is no evidence of a lead exposure level below which the cancer risk disappears.

* * * * *

BLOOD LEAD AND BLOOD PRESSURE

(Silverstein Aff., Ex. B)

Relationship in the Adolescent and Adult US Population

William R. Harlan, MD; Richard Landis, PhD; Robert L. Schmouder, MD, MPH; Nancy G. Goldstein, MPH; Lynne C. Harlan, MPH

* * * *

[p. 533]

Lead is ubiquitous in the human environment and has no known metabolic utility but does have a potential for toxic health effects. In this survey of the US population conducted from 1976 to 1980, there was a direct and linear relationship between blood lead and blood pressure. This association was statistically significant for systolic and diastolic pressures, and the effect was found at blood lead levels of less than 30μg/dL, which is the current "toxic" definition for occupational exposure.[22]

* * * *

[p. 534]

* * * *

No causal inferences should be drawn from this cross-sectional survey about the blood pressure effects of lead, calcium, and zinc, although these observations from the general population are consistent with extensive animal studies of lead toxic effects and trace metal interactions.

* * * *

Our analyses of the NHANES-II data provide a link between blood lead levels and blood pressure, but the cross-sectional nature of the survey limits inferences of causality.

---

[22] NIOSH Recommendations for occupational health standards. *MMWR* 1983; 32:663-676.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-0472

(Caption Omitted in Printing)

THIRD AFFIDAVIT OF STANLEY S. JASPAN

* * * *

2. Attached hereto and incorporated by reference as Exhibit A are true and exact copies of pages 1-2, 19-20 of the transcript of the deposition of Kelley Ann Brix, M.D., Assistant Professor of Occupational Medicine at the University of Michigan School of Public Health, that was taken by Defendant on October 17, 1985, in the above-entitled matter. Dr. Brix is one of the persons designated as an expert witness by Plaintiffs.

Dated this 1st day of October, 1986.

[Signatures Omitted in Printing]

* * * *

[EXCERPTS OF BRIX DEPOSITION]

* * * *

[2] Q. Will you state your full name?

A. Kelley Ann Brix.

Q. Your business address?

A. Department of Environmental and Industrial Health, University of Michigan, School of Public Health, Ann Arbor Michigan, 48109.

Q. I assume you're employed by the University?

A. Yes, I am.

Q. In what capacity?

A. I'm an Assistant Professor of Occupational Medicine and instructor of Internal Medicine and consultant in the Department of Family Practice.

* * * *

[19] Q. I'm asking your opinion based upon your review of the studies and whatever other bases you would rely upon, at what level do you believe there is evidence of adverse effect—what blood level is evidence of the adverse effect on the male reproductive system?

A. I think there is very strong evidence based on both animal and human information that above a blood lead of perhaps 60 to 70 that there can be an impact on the male reproductive tract.

Based on animal studies alone, it would [20] appear that there is an impact of lead on the male reproductive tract lower than that, as low as perhaps say 40 to 50 blood lead.

And it has shown to cause problems in certain species of animals but I cannot say that that's really the case in humans because we do not have good data in male patients, male subjects at those kinds of levels.

So I'm hesitant to make a statement one way or the other. We don't know.

* * * *

(9)

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

LIST OF PARTIES TO THE PROCEEDING

The plaintiffs in the district court, appellants in the court of appeals and petitioners in this Court, are: the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweatman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.

The defendant in the district court, appellee in the court of appeals, and respondent in this Court is Johnson Controls, Inc.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 886 F. 2d 871, and is reproduced at pp. 1a-101a of the Appendix to the Petition for a Writ of Certiorari ("Pet. App."). The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 680 F. Supp. 309, and is reproduced at pp. 3-20 of the Joint Appendix ("Jt. App.").

JURISDICTION

The Court of Appeals' opinion and judgment were issued on September 26, 1989. By an order entered by Justice Stevens, the time for filing a petition for a writ of *certiorari* was extended until January 12, 1990. Pet. App. 125a-26a. The *certiorari* petition was timely filed, and was granted on March 26, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*, are set out at Pet. App. 145a-46a.

STATEMENT OF THE CASE

A. The Facts

1. *The Exclusion of Women from Battery Manufacturing Positions*

Johnson Controls, Inc. ("the employer" or "the company") is a manufacturer of batteries. Occupational exposure to lead, the primary material used in the battery manufacturing process, entails a health risk to workers, including a health risk of harm to fetuses conceived by workers. Pet. App. 32a.

In 1977, Johnson Controls instituted its first official policy regarding the employment of women in lead-exposed jobs.[1] That policy stated:

> [P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. . .
>
> Since not all women who can become pregnant wish to become mothers, . . . it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant. [Jt. App. 140.]

Consistent with that view, the company recommended that women who expected to have children choose non-lead exposed jobs. The company did not, however, provide any guaranteed transfer for women who wished to leave lead-exposed jobs in order to protect any children they might be planning to have, nor did the company protect the prior wage rate of any women who did transfer.

In 1978, the Occupational Health and Safety Administration (hereafter OSHA), acting pursuant to its statutory authority to "promulgate any . . . occupational . . . health standard" (29 U.S.C. § 655), announced its Final Standard for Occupational Exposure to Lead. 43 Fed. Reg. 52952 *et. seq.*; 29 C.F.R. § 1916.1025 (1987). When that standard was being considered, OSHA devoted particular attention to the question whether the possible effect on fetuses carried by pregnant workers justified excluding women entirely from at least certain lead-exposed positions. 43 Fed. Reg. 52960. "No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry." *Id.* On the basis of its close study of the question, OSHA concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from

[1] It appears that the company did not employ any women in manufacturing jobs until after Title VII was passed. Jt. App. 157 (Fishburn).

the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52966; *see also, e.g.*, 43 Fed. Reg. 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." 43 Fed. Reg. 52966.[2]

In 1982, Johnson Controls, despite its own earlier pronouncements and those of OSHA, announced a broad exclusion of women from lead exposed jobs:

> It is [Johnson Control's] policy that women who are pregnant *or who are capable of bearing children* will not be placed into jobs involving lead exposure *or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.* [Pet. App. 9a (emphasis added); *see* Jt. App. 8 -86.][3]

Johnson Controls' policy applied to particular positions based upon whether a *single* individual in that position (not the mean or median individual) showed a blood lead level of more than 30 μg/dl once in the past year. Jt. App. 81, 123.[4] Moreover, even though the company con-

[2] Those protections, based upon the recognition that workers who are planning families should have *blood* lead levels below 30 μg/dl, included periodic biological and air monitoring beginning at 30 μg/m^3 *air* lead level; medical surveillance and consultation concerning the effects of lead on reproduction, including fertility testing and the right to have review by several physicians; educational and training provisions, so that "workers are fully informed of the potential hazards from exposure to lead on their reproductive ability, during pregnancy and following birth"; the right of workers planning families to use respirators for increased protection; and, where workers are planning families and reduction of blood lead levels is medically indicated, the possibility of temporary removal from lead-exposed jobs, with wage protection and assured possibility of return to the lead-exposed position for up to eighteen months. 43 Fed. Reg. 52966, 52992, 52997-98, 29 CFR § 1910.125 (k)-(n).

[3] There is one exception: incumbent women can retain their lead exposed jobs if they *individually* can reduce their blood lead levels to below 30 μg/dl. Jt. App. 83-84, 96.

[4] In fact, the record shows that at the time the record in this case closed, nearly two-thirds of employees in lead-exposed positions had blood-lead levels below 30 μg/dl. Jt. App. 145-46.

ducts individual blood lead testing as often as monthly on other employees (Jt. App. 124), the employer did *not* allow any women seeking to be hired or promoted into lead-exposed positions to demonstrate through individual blood monitoring an ability to keep her blood lead level below 30 μg/dl. *See Jt.* App. 88-89 (Beaudoin) (blood lead levels at the same work station can vary based on individual metabolism, good hygiene, and use of respirators.) And, there is no explanation in the record as to why the ban extended beyond the jobs actually exposed to lead. Finally, the company banned *all* women who could not prove their infertility from lead-exposed jobs, regardless of their family status, age, sexual orientation, fertility of sexual partner, or expressed intent to bear children.

The sum of the matter is that, in practical terms, the company barred women capable of bearing children from *all* manufacturing jobs in its battery plants (except a few held by incumbent women), and from some nonmanufacturing jobs as well. Jt. App. 56, 115.

2. *Harms Caused by Lead*

Lead is a toxic substance that can cause a wide range of health problems in men, women, and children, depending upon the exact exposure level. *See generally United Steelworkers of America v. Marshall*, 641 F.2d 1189, 1248-49 (D.C. Cir. 1980). In particular, "at least one part of the body, the reproductive system, begins to suffer very serious subclinical effects at 30 μg/100g of lead in the blood." *Id.* at 1249. Those effects, according to OSHA, include *both* a real danger to fetuses carried by pregnant employees resulting from lead exposure *in utero and* other serious impacts upon the reproductive systems of *both* men and women:

> The rulemaking produced ample evidence confirming the grave danger lead poses to prospective mothers and fetuses. . . OSHA [also] found evidence that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm (teratospermia), decreased mobility of sperm (asthenospermia), and decreased number of sperm (hypospermia) . . . . Older studies found alarmingly high rates of spontaneous abortion, stillbirth, and birth defects in the pregnancies of women married to lead-exposed workers. . . . Other studies found chromosomal abnormalities among lead exposed [male] workers.
>
> OSHA thus found abundant support for the view that a lead standard must protect the reproductive capacities of males as well as females. [*Id.* at 1257.]

On the basis of its lengthy consideration of the issue, OSHA decided that:

> [B]ecause of the demonstrated adverse effects of lead on reproductive function in both male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 microgram/100 g maximum permissible blood level in *both males and females who wish to bear children*. [29 C.F.R. Part 1910, pp. 833-34 (1987) (emphasis supplied).]

The District of Columbia Circuit approved this finding as well supported by the extensive administrative record. *United Steelworkers of America v. Marshall*, 647 F.2d at 1248-49.

Not surprisingly given this background, there was no dispute among the experts in this summary judgment proceeding on the basic fact that, as OSHA had concluded, lead poses a risk of significant harm to fetuses of pregnant workers at the 30 μg/dl blood lead level.[5] The

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[5] At the relatively low blood lead levels which Johnson Controls regards as sufficient to bar fertile women, the primary risk is that the children born will have "very subtle" learning problems (Jt. App. 170 (Chisholm)) and may exhibit behavioral problems such as hyperactivity (Pet. App. 15a). The record is *undisputed* on the fact that, contrary to the Court of Appeals statement, fetal lead exposure at the levels involved in this case does *not* cause structural abnormalities in vital organs. *E.g.*, Jt. App. 170, 171, 176 (Chisholm); 240 (Silbergeld).

There was some evidence, including a Center for Disease Control (hereafter CDC) report, that the risk of cognitive and behavioral

record on summary judgment in this case does not, however, address in any detail how likely it is that any particular child born to a mother who had at some point a blood lead level higher than 30 μg/dl will show harm traceable to prenatal lead exposure. *See e.g.*, Jt. App. 170 (Chisholm Dep.) ("we are dealing with a risk factor . . . [and] really can't say about individuals").[6]

There was directly conflicting evidence in the summary judgment record concerning the *other* harms caused by lead at the blood lead levels enforced by Johnson Controls for fertile women. Plaintiff's experts were uniformly of the view that, as OSHA had concluded, the available evidence, including some studies completed after the OSHA record was closed, support the conclusion that at 30 μg/dl, there is "no scientific basis to conclude that the reproductive risks experienced by males or females are different in severity at equal blood lead levels . . . [or that] offspring are at greater risk if either the male or female

harm to children exposed to lead *in utero* occurs at blood lead levels lower than 30 μg/dl. *See* Pet. App. 14a. OSHA, however, not the CDC, is the agency charged by Congress with determining occupational health standards, including fetal health standards. 29 U.S.C. §§ 651(b)(2) and (b)(5); *see United Steelworkers v. Marshall*, 647 F.2d at 1256 n.96 (injury to fetuses is cognizable under OSHA since such injury "is a material impairment of the reproductive systems of the parents.")

[6] There was also conflict in the competing experts' affidavits and depositions (including conflict between the employers' own experts) on precisely how and when the primary harm to the fetus through the mother occurs (*compare* Jt. App. 150 (Fishburn) (risk is in early weeks of pregnancy); 190 (Whorton) (same) with *id.* at 165, 167, 177 (Chisholm) (risk is only in the latter half of the last trimester of pregnancy); 199 (same); 239 (Silbergeld) (same). Further, while there was testimony that lead may be stored in the bones, and may therefore reappear in the blood after the worker leaves a lead exposed position, the record is entirely indistinct as to how long a woman would have to work in lead exposure to have such a buildup, except that it would have to be for some period of time. *E.g.* Jt. App. 168, 170, 201 (Chisholm) (cannot say whether a woman working two months would have sufficient lead buildup to endanger fetus); 182 (Scialli) (builds up if work "for any length of time").

parent has been lead exposed at equivalent levels." Jt. App. 262 (Silverstein).[7] Defendant's experts maintained, to the contrary, that there was either no evidence of a reproductive effect on males or of a fetal effect mediated through males, or that there was no evidence of such effects at the 30 μg/dl blood lead level at issue in this case.[8]

Plaintiff's experts were also of the view, backed by both animal and human studies reported in scientific papers, that there is a significant risk to the health of *adult* men and women at the 30 μg/dl level, including neurological and cardiovascular injury, and an increased likelihood

[7] Jt. App. 202-203, 221, 222 (Silverstein); 223, 238 (Silbergeld); 257 (Legator). Specifically, one of plaintiff's experts, Dr. Silverstein, a board certified physican in occupational medicine, pointed to studies indicating (1) that human sperm abnormalities are caused by lead exposure, and sperm abnormalities indicate genetic damage which may cause developmental abnormalities; (2) that the offspring of male animals exposed to lead show decreased learning ability; (3) that there are adverse reproductive effects, including infertility and impotence, in male animals and in human men at blood lead levels below 30 μg/dl. Jt. App. 205-215, 219. *See also*, on male reproductive effects, Jt. App. 226-227 (Silbergeld).

In particular, one study of male lead battery plan workers, concluded in 1984 by the National Institute of Occupational Safety and Health (NIOSH), reported a significant loss of fertility in families where the men had been exposed to lead, including a 25% loss of fertility where the male worker had a blood lead level of 25-44 μg/dl and the wives had blood lead levels much lower. Jt. App. 207-208, 216-219 (Silverstein). Another expert similarly reviewed specific animal and human studies and concluded that male-mediated effects in a worker's offspring can occur at the same blood-lead levels that are unsafe for a female employee's fetus. That expert stressed that studies showing spontaneous abortions in wives of lead-exposed men at high levels of lead exposure indicate fetal genetic effects at lower levels, since a miscarriage is, of course, a *lethal* fetal effect. Jt. App. 249-252, 258, 259 (Legator).

[8] Jt. App. 72 (Hammond); 155 (Fishburn); 186 (Whorton); *id.* at 192 (data on testicular effects on men unclear); 199 (Chisholm).

of certain forms of cancer.[9] For example, Dr. Ellen Silbergeld "would be concerned for anybody that has a blood lead level of 25," because "at these levels, everyone is at very severe and significant risk, male, female or fetus." Jt. App. 243, 246. Defendant's experts denied any adult effects at blood levels below 50 μg/dl in general terms, but did not specifically refer to or dispute the evidence relied upon by plaintiff's experts. Jt. App. 72 (Hammond); 180 (Scialli) (risk to fetuses "may" occur at lower levels); 200 (Chisholm); 253 (Legator).

B. The Proceedings Below

This challenge to Johnson Control's policy excluding fertile women from battery manufacturing jobs was filed by eight employees, certified as representatives of a class of similarly situated employees, and the union representing the employees, the International Union, UAW. Among the individual plaintiffs were Mary Craig, who elected to have herself sterilized in order to avoid loss of a desirable employment position (Jt. App. 35, 62);

[9] Jt. App. 203-205, 222-225 (Silverstein); 227-228, 243, 244, 246 (Silbergeld); 262, 263 (Silverstein) (incorporating articles showing psychological, cardiovascular, and carcinogenic dangers due to blood lead at equivalent exposure levels to those at which Johnson Controls excludes fertile women). One of plaintiff's experts noted, for example, that recent studies of adults show that they suffer mood changes at 30-40 μg/dl exposure level, and a significant increase in high blood pressure at 15-25 μg/dl blood lead level. Jt. App. 227, 229, 243, 245 (Silbergeld). The Environmental Protection Agency ("EPA") relied upon the blood pressure studies in considering the further reduction of lead in gasoline. *See* 50 Fed. Reg. 9400-01 (1985) (EPA discussion of studies demonstrating that adult males are subject to an increased risk of high blood pressure, with resultant dangers of heart disease and strokes, at blood lead levels well below those which Johnson Controls considers safe for fertile women); W. Marcus and C.R. Cothern, *The Characteristics of An Adverse Effect: Using the Example of Developing a Standard for Lead*, 16 Drug Metabolism Reviews 423, 430 (1985-86) ("if blood lead levels were lowered from 17 to 10 micrograms/deciliter there would result in savings of a minimum of 50,000 [heart attacks], 70,000 strokes and 25,000 predicted deaths over a 10-year period").

several female employees (one of whom, Elsie Nason, was fifty years old and divorced) who were transferred from lead-exposed positions, with loss in compensation (Jt. App. 31, 32, 33, 35, 59, 60-61); and Donald Penney, a male employee whose request for a leave of absence for the purpose of lowering his blood lead level because he intended to become a father, was denied (Jt. App. 36, 66-69).

After discovery, the company sought, and the District Court granted, summary judgment. That court held:

> Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory. . . [Jt. App. 17.]

The District Court therefore treated the explicitly gender-based policy in this case as if the employer had adopted a neutral policy with only a disparate *impact* upon women as a group, and, applying an "expanded . . . business necessity defense," refused to invalidate the discriminatory policy. Jt. App. 17-20.[10]

On appeal, the Seventh Circuit, sitting *en banc*, affirmed by a 7-4 vote. First, the Court of Appeals majority agreed with the district court's basic disparate impact business necessity approach (Pet. App. 27a), but went further, placing on the *plaintiff*, not on the employer the burden of persuasion on the two key evidentiary issues that purportedly justify departure from ordinary facial discrimination analysis—whether the danger to fetuses is substantial, and whether there is fetal danger only due to female exposure, or due to male exposure as well. Pet. App. 28a-32a.

[10] The District Court did not determine whether Johnson Controls' policy can be justified under the "bona fide occupational qualification" (hereafter bfoq) exception to Title VII, but did note that the policy would not meet traditional bfoq standards because "an employee's job performance would not be affected by pregnancy." Jt. App. 17 n.5.

Second, although the District Court had declined to reach the issue, the Court of Appeals decided that "Johnson Controls' fetal protection policy could be upheld [on summary judgment] under the bona fide occupational qualification defense." Pet. App. 42a. Where a business may present some danger to the health of a fetus carried by an employee, providing perfect protection for the fetus, said the Court of Appeals, is part of the "essence" of the business. Pet. App. 48a. Rather than remanding for consideration of the factual elements of the bfoq defense, the Court of Appeals majority went on to review on its own the summary judgment record, and held that the defense was established. Pet. App. 50a-54a.

The four dissenters wrote three dissenting opinions. All the dissenters were of the view that a case such as this one must be analyzed as a facial discrimination case, as to which the only pertinent defense is the bfoq defense provided by § 703(e), 42 U.S.C. § 2000e-2(e). Pet. App. 60a, 62a-64a, 75a-81a. Judge Easterbrook, joined by Judge Flaum, further maintained that the proffered justification—the moral imperative of protecting fetal health from mistaken parental risk assessments—does not, as a matter of law, meet the statutory standard of equal treatment of employees "similar in their ability or inability to work," and is not a legally cognizable bfoq. Pet. App. 81a-87a. Judges Posner and Cudahy, in contrast, were of the view that the bfoq defense may, in very narrow circumstances, be available for justifying fetal protection policies, but believed that it was entirely inappropriate to grant summary judgment for the employer on the present record. Pet. App. 60a, 76a-74a.

SUMMARY OF ARGUMENT

I. By proving that Johnson Control's fetal protection policy explicitly establishes an additional job qualification, proof of infertility, for all women and no men, the plaintiffs have met their burden under Title VII of demonstrating a violation of the proscription against mak-

ing gender-based employment decisions. This conclusion does not change with the observation that only women can bear children. In enacting the Pregnancy Discrimination Act ("PDA") in 1978, Congress specifically intended to proscribe as gender-based discrimination distinctions based upon childbearing capacity, recognizing that such distinctions were the basis for many of the policies that had relegated women to inferior status in the workplace. Johnson Controls' policy also violates the three underlying purposes of proscribing explicit sex discrimination in the workplace: assuring the treatment of employees individually, rather than as members of proscribed groups; preventing gender-based stereotypes from tainting the decisionmaking process and stigmatizing women; and making certain that those policies that adversely affect women, even unavoidably, do not institionalize their detrimental effect, but instead change in response to relevant background changes.

II. Under Title VII, an employer can justify facial sex discrimination in distributing employment opportunities only under the § 703(e) exception for bona fide occupational qualifications ("bfoq"). That affirmative defense is an extremely limited one, and has no application here. First, both Title VII precedents and the PDA make clear that only requirements relating to effective job performance can constitute a bfoq. Absent this limitation, employers would be free to subordinate the basic nondiscrimination norm of Title VII to their individual values, rely upon non-job-performance related goals as a cover for discriminatory assumptions or stereotyped thinking, and decide complex health issues based on their needs rather than on the determinations made by agencies, such as the Occupational Safety and Health Administration, designated by Congress. Secondly, if available, a bfoq defense based upon fetal protection concerns would be far from narrow, and indeed could severely undermine the Title VII proscription upon sex discrimination in employment. Finally, to meet broq standards in the

present situation, at the very least an employer would have to show that the fetal harms sought to be avoided are only mediated through women; that the company protects occupational health generally at the same level as it protects fetal health; that fetal concerns relate to the "essence" of the particular business on some basis *not* applicable to businesses generally; and that the *degree* of protection provided is "reasonably necessary" to the business. The Court of Appeals either made no inquiry into or committed error in considering each of these requirements.

ARGUMENT

In this case the petitioners challenge Johnson Control's policy providing that "[a]ll women except those whose inability to bear children is medically documented" are barred from "jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Jt. App. 81, 85, 86.[11] It is our contention that this policy, on its face, constitutes disparate treatment of women in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; that the employer has not met its affirmative burden of demonstrating that the policy is saved by the "bona fide occupational qualification" defense stated in § 703(e) (the "bfoq" defense); and that Title VII does not provide any defense other than the bfoq defense for employer policies that constitute facial sex discrimination. We treat with § 703(a) in part I of our argument and with the affirmative defense aspect of this case in part II.

I. JOHNSON CONTROLS' FETAL PROTECTION POLICY CONSTITUTES FACIAL DISCRIMINATION ON THE BASIS OF SEX.

A. The two basic legal principles that govern a Title VII facial discrimination case such as this one and de-

[11] There is an exception for certain incumbent fertile female employees. *See* p. 3, *supra*.

termine whether the plaintiffs have carried their initial burden of proof are now clearly established. First of all,

> In passing Title VII, Congress made the simple but momentous anouncement that sex, race, religion, and national origin are *not relevant to the selection, evaluation, or compensation of employees*. . . . In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." 42 U.S.C. §§ 2000e-2 (a)(1),(2) (emphasis added). We take these words to mean that *gender must be irrelevant to employment decisions*. [*Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775, 1784-85 (1989) (plurality opinion) (citation omitted).]

Thus, the heart of a Title VII facial discrimination case is proof that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 1786. In other words, as Justice O'Connor put this same point in her concurring *Price Waterhouse* opinion,

> There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. [*Id.* at 1798.]

Second, and of equal significance here, as Justice O'Connor went on to note, "*explicit* consideration of race, color, religion, sex, or national origin in making employment decisions 'was the most obvious evil Congress had in mind when it enacted Title VII'." *Id.* at 1803, quoting *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis supplied). Consequently, a disparate treatment plaintiff satisfies her burden of proof by "demonstrat[ing] by *direct evidence* that an illegiti-

mate factor played a substantial role in . . . [the] decision." 109 S. Ct. at 1803 (emphasis added).

For example, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the plaintiffs established that there was an express company policy permitting pilots "disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer". *Id.* at 114. This Court recognized that because this policy, standing alone, provided "*direct evidence* that the method of transfer available to a disqualified captain depends upon his age," the policy

> *is discriminatory on its face. Cf. Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (employer's policy requiring female employees to make larger contribution to pension fund than male employees is discriminatory on its face). [469 U.S. at 121-122 (emphasis added).]

In sum, where an employer issues an employment policy that explicitly distinguishes between employees on the basis of sex, that policy, without more, constitutes facial sex discrimination, and is sufficient to make out a Title VII disparate treatment case.

The threshold question here, then, is whether Johnson Controls' fetal protection policy is discriminatory on its face; if so, the plaintiffs have carried their initial burden of showing that the policy is unlawful under Title VII and the Court of Appeals' contrary conclusion is wrong.[12]

[12] The only alternative that has been suggested for analyzing cases challenging gender-based fetal protection policies posits that at least some such cases as ones involving not facial sex discrimination, but an employment practice with only a disparate impact upon women. Pet. App. 22a-23a; *Wright v. Olin Corp.*, 697 F.2d 1172, 1186 (4th Cir. 1982) (en banc); *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1548-49 (11th Cir. 1984).

The distinction is, of course, one of great significance in Title VII law: Where a plaintiff *cannot* "prove intentional discrimination," but can only demonstrate a "facially *neutral* employment practice[] that [has] significant adverse effects on [a] protected *group*," the plaintiff may still be able to prove a Title VII case, but "[t]he factual issues and the character of the evidence are inevitably somewhat different" than in a disparate treatment case. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (emphasis added).

Specifically, as this Court spelled out last term, where a plaintiff *cannot* prove that a distinction was made by taking gender into consideration, then the *plaintiff* must identify a specific employment practice, prove its discriminatory impact, and "bear[] the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration" that is not "insubstantial." *Ward's Cove Packing Co. v. Atonio*, — U.S. —, 109 S. Ct. 2115, 2126 (1989).

The reason that, in a true disparate impact case, the employer's justification need only be a legitimate business reason, and "[t]he utimate burden of persua[sion] . . . remain[s] with the plaintiff" is that in such a case, only by negating the employer's asserted *neutral* justification can the plaintiff establish that a particular employment practice, although facially neutral, is "in operation . . . functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. at 986, 987.

In contrast, where the plaintiff proves an employment practice that *explicitly* distinguishes between men and women, the burden of demonstrating gender-based discrimination is necessarily met, and need not be met a second time. *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion); *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. 702, 711 (1978); *Trans World Airlines v. Thurston*, 469 U.S. at 121.

B. (1) The employment policy at issue sorts eligible from ineligible employees by establishing different job qualifications and procedures along explicit gender lines: Women generally, *but no men*, are presumed ineligible for certain jobs, and are denied covered jobs unless they come forward with information regarding their reproductive capacity. Jt. App. 159-160.[13] Requiring proof of sterility as a precondition to obtaining or retaining a

[13] With regard to incumbent fertile women, the policy provides that they may be able to retain their jobs, but will be required to undergo substantially more blood lead level testing than men, use respirators when men do not, and maintain lower blood lead levels than men and do so on pain of removal from their jobs if their blood lead levels rise above the woman's level. Jt. App. 57-61, 80-81. Thus, incumbent women too are presumed ineligible, and are allowed to retain their jobs only on special conditions not applicable to men.

job is, in itself, a serious intrusion into very sensitive matters, even for those whose personal reproductive situation conforms to the employer's requirement. Moreover, those who cannot provide the information are as a practical matter forced to choose between their job opportunities and their childbearing capacity. Since many women are economically dependent upon their jobs, putting women to that choice conditions employment for women, but not for men, upon the inability to exercise "the right to have offspring . . . one of the basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942).[14]

Johnson Controls' fetal protection policy therefore involves an explicit difference of major proportions in the way *all* men and *all* women are treated for job assignment purposes. As such, the company's policy is facially discriminatory, because it "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of Los Angeles, Department of Water v. Manhart*, 435 U[illegible] at 711.

(2) Viewing Johnson Controls' fetal protection policy more narrowly—and thus more favorably to the company—as one that excludes from covered positions the subgroup of women with the capacity to bear children, does not alter the conclusion that the policy on its face violates the Title VII proscription upon "us[ing] gender as a criterion in employment." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion).

A policy that explicitly establishes different job qualifications for men and for women is unlawful facial discrimination on the basis of sex, even though some (or even most) women are able to meet the special qualifica-

[14] Ms. Mary Craig, one of the named plaintiffs in this case, submitted to sterilization on June 27, 1983 in order to be assured of retaining her job. Jt. App. 62-63. *See also, e.g., Oil Chemical & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444, 446 (D.C. Cir. 1984).

tion established for their gender. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). (Title VII invalidates "one hiring policy for women and another for men—each having preschool children.") There is no exception to this general principle for qualifications centering upon women's capacity to carry fetuses within their bodies during gestation; *viz.*, to bear children. That this is so was made clear, if it was not clear before, by the Pregnancy Discrimination Act ("PDA") of 1978.[15]

The PDA provides that, for Title VII purposes, "The terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." Title VII § 701(k), 42 U.S.C. § 2000e-(k). The physical ability to become pregnant and to bear a child is certainly a medical condition "related" to pregnancy and to childbirth. The PDA's background and legislative history, moreover, show that Congress specifically intended with this statutory language to make it clear that discrimination premised in any way on women's capacity to bear children *is* discrimination based squarely on gender, and is *not* a facially neutral employment policy. Indeed, Congress regarded that principle as central to eliminating the disadvantage suffered by women in the workplace.

The background of the PDA begins with this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136. The *Gilbert* dissenters disagreed, with Justice Stevens in particular expressing the view that pregnancy-based dis-

[15] While, as we recount below, there were pre-1978 legal disputes concerning whether disparate treatment of actual pregnancies is sex discrimination and this Court determined that it is not, there is nothing in any case indicating that the Court would have approved a hiring policy, or a disability plan, that *excluded all women with childbearing capacity*. Because Congress passed the PDA before any such issues arose, however, this Court was never required to pass on such a policy.

crimination is sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 162 (Steven, J., dissenting).

In enacting the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision," and instead took the view that it was " 'the dissenting Justices [who] correctly interpreted the Act.' " *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, (1983) (*quoting* H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. p. 2 (1978) (hereafter H.R. Rep.), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources) (hereafter Leg. Hist.) at 148 (1979)); *see also California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 277 n.6 (1987).

In particular, the PDA's legislative history reflects Congress' intent to incorporate into Title VII the proposition that "a classification that harms only women and does so on the basis of a factor inextricably linked to gender is . . . discrimination against women." Leg. Hist. at 23 (remarks of Rep. Hawkins).[16] Further, the reporting committees specifically recognized that "the ability to become pregnant is the fundamental difference between genders" (S. Rep. at 2, Leg. Hist. at 39), and explicitly approved, as "correctly express[ing] both the principle and the meaning of title VII" the passage from Justice Stevens' *Gilbert* dissent to that effect quoted above (S. Rep. at 2-3, Leg. Hist. at 39-40; H. Rep. at 2, Leg. Hist. at 148).[17]

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[16] *See also* S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) (hereafter S. Rep.) at 4, Leg. Hist. at 41 (describing the bill as "defin[ing] sex discrimination . . . to include those physiological occurrences peculiar to women"), H.R. Rep. at 5, Leg. Hist. at 151 ("the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.")

[17] *See also id.* at 168 (remarks of Rep. Sarasin) (same); *id.* at 69 (remarks of Sen. Bayh) ("what this measure is designed to do is to say to . . . employers . . . 'thou shall not discriminate against a classification within the workforce, women, because women are uniquely capable of becoming pregnant' ").

As Senator Williams—the chief sponsor of the bill in the Senate and the chairperson of the committee that reported the bill—explained, the concept that discrimination based on childbearing capacity is unlawful under Title VII is central to the purpose of the PDA:

> The legislation is . . . important because, in the long run, it will permit the 36 million working American women to assume their rightful place, and make a full contribution to our Nation's economy. . .
>
> These shocking statistics [concerning job segregation of women] cannot be made better unless working women are provided effective protection against discrimination on the basis of their childbearing capacity. . . . Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers. . . . Thus, the overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular to a second-class status with regard to career advancement and continuity of employment and wages. [Leg. Hist. 61-62.][18]

Consistent with this purpose, as incorporated in Title VII § 703(a)(1), the effect of the PDA is to proscribe a "refus[al] to hire . . . any individual, or . . . discrim-

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[18] *See* S. Rep., *supra*, at 6-7, Leg. Hist. at 152-53:

> Women are still subject to the stereotype that all women are marginal workers. Until a women passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women. . . .

See also Leg. Hist. at 168 (remarks of Rep. Hawkins) ("many of the disadvantages imposed on women are predicated upon their capacity to become pregnant").

inat[ion] against any individual with respect to his . . . terms, conditions, or privileges of employment, . . . because of such individual's . . . [capacity to bear children]." Because Johnson Controls' policy excludes women —and only women—from certain jobs *precisely because of their capacity to bear children*, that policy is facially discriminatory under the statute as amended by the PDA.

C. Thus, whatever view one takes of the precise classification upon which Johnson Controls' fetal protection policy turns, that classification constitutes facial sex discrimination within the meaning of Title VII. And, Johnson Controls' policy violates not only the letter but each of the underlying purposes of Title VII's basic proscription of explicit gender-based distinctions.

There are at least three critical reasons *why* "Congress considered reliance on gender or race in making employment decisions an evil in itself." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring). All three are implicated by the employment policy here at issue.

First, Johnson Controls' fetal protection policy transgresses the line between policies based on gender-linked (or race-linked) risks, and those based on actual differences among individuals, a line central to Title VII's interdiction of explicit sex (and race) discrimination.

In making a gender-based risk assessment, one is determining that members of one sex are more likely than members of the other to possess some desirable or undesirable trait. Under Title VII, however, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 708. As this Court there explained, "the basic policy of the statute requires that we focus upon fairness to individuals rather than fairness to classes." *Id.* at 709. Because "[t]he statute's focus on the individual is unambiguous," Title VII ordi-

narily "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708.

As in *Manhart*, "[t]hat proposition is of critical importance in this case because there is no assurance that any individual woman . . . will actually fit the generalization on which the [company's] policy is based." 435 U.S. at 708.[19] While the theoretical *risk* of fetal cognitive deficit may exist whenever a fertile woman is exposed to lead, only a *small percentage* of the exposed women will become pregnant, and only a *small percentage* of their offspring will be adversely affected.[20] Thus, how-

[19] In *Manhart*, and in *Arizona Governing Committee v. Norris*, *supra*, the "true generalization" was that women on the average live longer than men on the average, so that a man has a greater *risk* of death at any relevant age. *Manhart*, 435 U.S. at 712; *Norris*, 463 U.S. at 1080-81.

[20] First, the percentage of fertile women who bear children decreases with age, to almost zero for women over 40. *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1232-33 (1986).

Second, as the foregoing suggests, modern women are largely, if not entirely, in control of whether or not they will bear children during a certain time period. Some women do not engage in heterosexual intercourse, while others who do either are married to infertile men (including men who have had vasectomies), or have no intention of having a child and take the relevant precautions. And while it is true that contraceptives do fail, they do not necessarily or even ordinarily fail.

Third, Johnson Controls' fetal protection policy excludes women based not upon the average or median blood lead level in the job to which they aspire but upon whether *one* job incumbent has an unacceptable blood lead level. Jt. App. 83. The record shows, however, that almost two-thirds of the job incumbents in covered jobs had blood lead levels below the 30 microgram level. Jt. App. 145-46. Moreover, the company admits that with proper hygiene, employees *should* be able to keep their blood lead levels below that figure; on that basis, incumbent women were allowed to retain their lead-exposed jobs, as long as the individual incumbent controls her blood lead levels. Jt. App. 98-99.

Finally, even among women who are exposed at the blood lead level the company maintains is dangerous, and who do have children

ever, one quantifies the numbers and evaluates the risks, the only *certainty* is that the large majority of women, will, under Johnson Controls' policy, lose employment opportunities solely because of their status as a woman, and not because of any fetal injury caused by their employment. To prevent such group-based disadvantages is precisely the point of Title VII.

Nor is the statutory protection against disadvantage because of membership in a proscribed class any less simply because there might be some difficulty in demonstrating more precisely *which* members of the high risk group in fact have the trait the employer desires to discover—in *Manhart*, longevity, here, fetal harm. The reason that insurance and occupational health regulations turn largely upon assessment of *risk* of injury or death is that both concern "events that are individually unpredictable." *City of Los Angeles, Department of Water* v. *Manhart*, 435 U.S. at 710. Nonetheless, "[i]ndividual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Id. See also Arizona Governing Committee v. Norris*, 463 U.S. at 1085 n.15 ("For some jobs, . . . there may be relevant skills that cannot be identified by testing. Yet Title VII clearly would not permit use of race, national origin, sex or religion as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.").[21]

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shortly thereafter, the record makes clear that whether and to what degree fetal harm will occur depends upon a host of individual circumstances, including the period and level of the exposure and the individual woman's and infant's metabolic system. Jt. App. 88, 99, 148, 182.

[21] *Cf. Craig v. Boren*, 429 U.S. 190 (1976) (where statistics show that a higher percentage of young men than young women endanger lives by driving after drinking, different drinking ages for men and women are nonetheless unconstitutional even though as dissent stated "[t]here [was] no apparent way to single out persons likely to drink and drive," (*id.* at 227 (Rehnquist, J., dissenting)).

Second, Title VII law (as well as this Court's constitutional jurisprudence) establishes that, whatever an employer's purpose in discriminating, there is an important long-term policy reason for insisting upon a difference of controlling significance between a policy that in terms classifies individuals in a proscribed or suspect fashion, and one that is stated and pursued neutrally, but turns out to have a disparate impact, even if the disparate impact is identical to or closely parallels a gender classification. *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 710 & n.20; *Arizona Governing Committee v. Norris*, 463 U.S. at 1085-86 & n.15; *compare Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

That significance inheres, in large part, in the fact that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups . . ." (*Manhart*, 435 U.S. at 709), and create a "stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex," (*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring)). Given the history of stereotyped and prejudiced thinking and decisionmaking with respect to certain classifications of employees, a major purpose of Title VII is "a prophylactic one" (*Albemarle Paper Co. v. Moody*, 442 U.S. 405, 417 (1975)), designed to reform employers' decisionmaking and communication processes, and to remove any stigma attached to belonging to one of the proscribed classifications.

For this reason, while an employer's purpose in adopting a distinction based upon gender may be relevant in the ultimate determination whether the policy is lawful under Title VII (*see* part II, *infra*), that purpose, however benign or laudable, is *not* relevant in determining whether the *criterion* used in the company's policy is one proscribed in § 703(a). Indeed, in many instances, an employer who discriminates on a proscribed basis does so for a *purpose* that is, standing alone, perfectly valid—for

example, determining job competence, or saving money, or increasing efficiency.[22] And, as Judge Easterbrook added below, "[i]n principle [Congress or] a court could make the legal standard turn on what the authors of a rule are trying to accomplish, rather than on the criteria they use to get there." Pet. App. 77a. But, as Judge Easterbrook also noted, this Court determined in *City of Los Angeles, Department of Water v. Manhart*, that Congress did not incorporate such a standard in Title VII. Pet. App. 77a. Instead, "Congress has decided that *classifications* based on sex, like those based on national origin or race, are unlawful," (*Manhart*, 435 U.S. at 709 (emphasis supplied)), because "whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual," (*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J., concurring)).

As we develop in greater depth in part II of our argument, there is at least a substantial risk that employers instituting fetal protection policies are expressing, albeit unthinkingly, the stereotypical assumption that women are marginal workers whose economic importance and need for employment is necessarily subordinate to their childbearing role. Against that background, there is ample reason for insisting, as Title VII does, upon a "prophylatic" gender-neutral decisionmaking process regarding industrial safety policies.

Finally, a policy conceived and stated in neutral rather than gender-linked terms is inherently responsive to changes in the scientific or other evidence regarding the justifying purpose, while a policy conceived, justified, or expressed in a gender-linked way is inherently static even when the relevant background changes.

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[22] As Judge Posner observed in his dissent in the Court of Appeals, "it is unlikely that most employment discrimination in the private sector is irrational . . . ; competition tends to drive from the market firms that behave irrationally. See Becker, The Economics of Discrimination (2d ed. 1971)." Pet. App. 62a.

For example, the premise of Johnson Controls' policy is that fetal health concerns exist at levels considerably lower than those which present health risks to adult men and women. Respondent's Brief in Opposition at 6 n.15. That premise, as we have pointed out, was extremely dubious at the time that the record in this case closed, and has become even more dubious in the intervening years. *See* pp. 6-8, *supra*.

If Johnson Controls' fetal health policy were part of a broad, generally-stated plan linking prevention of health risks to the available evidence and to the technologically feasible control mechanisms, then such a change in scientific knowledge might be reflected in the application of the policy. Because Johnson Controls has, instead, conceived and articulated the policy in rigid, gender-linked terms, the policy does not self-generate changes in its terms as the relevant information develops; instead, the burden falls upon the female employees adversely affected continually to retest the policy as new conditions develop (if, indeed, they are not barred by *res judicata* principles once having done so unsuccessfully).

Thus, there is no escaping the conclusion that this is a situation in which the employer's use of an "illegitimate criterion to distinguish among employees" has resulted in precisely the harms the proscription on such criteria was intended to cure, and in which it is therefore "the employer's burden to justify decisions resulting from that practice." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion).

II. JOHNSON CONTROLS' FETAL PROTECTION POLICY CANNOT BE JUSTIFIED AS A BONA FIDE OCCUPATIONAL QUALIFICATION WITHIN THE MEANING OF § 703(e) OF TITLE VII.

Where a plaintiff alleges and proves that an employer has adopted a policy that is facially discriminatory and that adversely affects the plaintiff, that policy "is unlawful unless exempted by . . . some . . . *affirmative* justification,," *City of Los Angeles, Department of Water v. Man-*

hart, 435 U.S. at 711 (emphasis supplied); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121-22. The *only* "affirmative justification" provided for in Title VII for an employment policy that expressly denies employment opportunities on the basis of gender is § 703(e), which sets out the bona fide occupational qualification ("bfoq") defense. *Phillips v. Martin Marietta Co.*, 400 U.S. at 544; *Dothard v. Rawlinson*, 433 U.S. 321 332-33 (1977); *Arizona Governing Committee v. Norris*, 463 U.S. at 1083-84 & n.13; *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1786 (plurality opinion); *see also id.* at 1787.[23]

In § 703(e), Congress provided that an employee's sex can be taken into account in making employment decisions in "those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The remaining statutory issue in this case is therefore whether Johnson Controls' fetal protection policy constitutes one of those "certain instances" that come within the bfoq exception.

The Court of Appeals in this case held (unlike the two other appellate courts that had addressed the precise question) that fetal protection policies do come within the bound of the bfoq defense.[24] In so concluding, the Court of Appeals fundamentally misconceived the overall thrust of the bfoq exception, as well as each of its component elements.

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[23] As with affirmative defenses generally (*e.g., United States v. First National City Bank of Houston*, 386 U.S. 361, 366 (1967)), and as in other situations under Title VII in which an employer defends against disparate treatment demonstrated by direct evidence, the burden of persuasion is on the employer to prove each of the statutory elements of the defense. *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 (plurality opinion); *id.* at 1797-99, 1801 (O'Connor, J., concurring).

[24] *See Hayes v. Shelby Hospital*, 726 F.2d at 1549; *Wright v. Olin Corp.*, 697 F.2d at 1187; *see also Burwell v. Eastern Airlines*, 633 F.2d 361, 371 (4th Cir. 1980) (en banc).

A. This Court has directly addressed the general question of the reach of the bfoq defense in *Dothard v. Rawlinson, supra*, and in *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).[25] *See also Trans World Airlines v. Thurston*, 469 U.S. at 122-24; Johnson v. Mayor & City *Council of Baltimore*, 472 U.S. 353 (1985). Those cases stress that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson*, 433 U.S. at 334.[26] In particular, this Court has held

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[25] *Criswell* (and *Thurston*) were decided under the Age Discrimination in Employment Act (hereafter ADEA), not under Title VII. However, as *Criswell* itself recounts, the relevant bfoq language in the ADEA was borrowed directly from Title VII, and has always been understood to track the parallel provision in Title VII. 472 U.S. at 411-412, 413 n.18, 414 n.19, 416. We therefore proceed in the text on the premise that the standard set out in *Criswell* applies in general terms under Title VII.

[26] In support of its reading of the bfoq provision, *Dothard v. Rawlinson* pointed to the "consistent interpretation of the Equal Employment Opportunity Commission [EEOC]." 433 U.S. at 334. In general terms, the EEOC remains committed to the propositions that the bfoq should be interpreted "narrowly," and that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities." 29 C.F.R. § 1604.2. And the EEOC now agrees that the only pertinent defense in a fetal protection policy case is the bfoq defense. EEOC, Policy Guidance on United Auto Workers *v.* Johnson Controls, Inc. (Jan. 24, 1990) ("1990 EEOC Policy").

The EEOC's interpretation of Title VII's application to fetal protection policies has, however, been far from consistent. *See* Proposed Interpretive Guidelines by EEOC and OFCCP on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514, 16501 (1980), *withdraw* 46 Fed. Reg. 3916 (1981); EEOC, Policy Statement on Reproductive and Fetal Hazards Under Title VII, reprinted in BNA (Oct. 3, 1988); EEOC Compliance Manual § 624 (Reproductive and Fetal Hazards); 1990 EEOC Policy, *supra*.

In particular, the last two documents, both of which are currently in effect, are in some tension with each other upon whether fetal protection concerns may constitute a bfoq. *Compare* Compliance Manual § 624.4 ("The [bfoq] exception does not apply to [policies based on reproductive and fetal hazards]. That narrow exception applies only in situations where all or substantially all members

that to constitute a bfoq a job qualification must relate to the "essence" (*Dothard v. Rawlinson*, 433 U.S. at 333, 336) or the "central mission of the employer's business." (*Western Air Lines v. Criswell*, 472 U.S. at 413). Finally the precedents establish that bfoqs must be

> something more than "convenient" or "reasonable"; they must be "reasonably necessary . . . to the particular business," and this is only so when the employer is *compelled* to rely on [sex] as a proxy for the safety-related job qualifications validated [under the "essence of the business" test]. *Western Airlines v. Criswell*, 472 U.S. at 414.]

B. In giving precision to this Court's conclusion that the bfoq is an "extremely narrow exception" "the starting point . . . is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The pertinent wording of the bfoq defense contains no less than *six* different terms of limitation making it plain that the exception reaches only very unusual situations, and should not be interpreted in any way that would negate the basic prohibitions of the statute: Discrimination is permitted only in "those *certain* instances where religion, sex, or national origin is a *bona fide occupational* qualification *reasonably necessary* to the *normal* operation of that *particular* business or enterprise." Title VII § 703(e), 42 U.S.C. § 2000e-2(e) (emphasis supplied).

Had each of the underlined words been omitted, the exception would have applied in "those instances where

of a protected class are unable to perform the duties of the job in question.") with 1990 EEOC Policy, Pet. App. 127a-144a (adopting, at least for investigatory purposes, the view that the bfoq may, in very narrow circumstances, permit fetal protection policies that facially discriminate on the basis of gender.)

Thus, for purposes of determining under what circumstances, if any, broad gender-based exclusions grounded in fetal protection concerns can constitute a bfoq, the EEOC's views should be considered, but given no special deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

religion, sex, or national origin is a qualification [for] that business or enterprise." Thus, the six terms of limitation could have been eliminated without impairing the general thrust of the provision. That Congress nonetheless took care to include all six demonstrates an intent: (1) to prevent, through the "occupational" limitation, the use of subjective requirements of a general nature in contrast to objective verifiable requirements that concern job-related skills and aptitudes; (2) to preclude, through the references to "certain" circumstances and the "particular" business, reliance upon factors of broad applicability to many jobs and businesses; and (3) to assure, through the "bona fide," and "reasonably necessary" to the business's "normal" (as opposed to occasional or incidental) operation requirements, against pretextual, or overbroad, evasions of the basic statutory prohibition by such strategies as the imposition of peripheral, or inconsistently applied, qualifications.[27]

C. (1) In evaluating the employer's bfoq defense here, the most important—and, we believe, the independently determinative—question is whether that defense reaches a fetal protection policy that excludes fertile women from [redacted] jobs they are perfectly capable of performing. The limitation in the bfoq defense to "occupational" qualifica[redacted] heretofore been uniformly understood as spe-

[redacted] Judge Posner, in his dissent in the Court of Appeals, read the term "normal" as indicating some external societal moral judgment of the way the business is operated, rather than referring to the way a particular business in fact ordinarily operates. Pet. App. 54a.

The *Dothard* Court, however, understood the term otherwise in this statutory context, in finding that a bfoq existed because in the particular prison there at issue, "violence is the order of the day." 433 U.S. at 336. While Justice Marshall objected that that very circumstance, among others, made the prison unconstitutional and therefore not "normal," and complained that "the existence of such violations should not be legitimatized by calling them 'normal'" (*id.* at 342), the Court evidentally saw the statutory term as connoting no such policy judgments. *See also*, 5 Oxford English Dictionery (2nd Ed., 1989) p. 515.

cifying that *only* qualifications relating to job performance can justify an otherwise discriminatory employer policy. *Weeks v. Southern Bell Tel. & Tel. Co.*, 498 F.2d 228, 235 (5th Cir. 1969), *quoted in Dothard v. Rawlinson*, 433 U.S. at 338 (requirements concerning "the duties of the job involved").[28] For example, in *Dothard*, the primary skill of the job at issue, correctional counselor, was the ability to "maintain prison security." 433 U.S. at 335. The Court concluded that because of the likelihood of sexual assaults in the particular maximum security prison doing the hiring, "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security. . . ." *Id.* at 336.

Similarly, in *Western Airlines v. Criswell*, the Court focussed upon "the nature of the flight engineer's tasks", and "the actual capabilities of persons over age 60" in relation to those tasks. 472 U.S. at 406. Thus, while *Criswell* was centrally concerned with the office of safety considerations in a bfoq case (*see, e.g., id.*, at 416, 420 *et seq.*), those safety concerns were not *independent* of the individual's abilities to perform the assigned tasks, but rather involved the possibility that, due to age-connected debilities, a flight engineer might not properly assist the airplane pilot, and might *thereby* cause a safety emergency.

The Title VII (and ADEA) cases in the lower courts, with the exception of the opinion below, also are substantially uniform in recognizing as bfoq's only requirements that in some sense or another relate to the ability

[28] At the time Title VII was enacted, over twenty states had fair employment practices legislation of one kind of another. The term "bona fide occupational qualification" appears in a number of those statutes, and was generally interpreted by the various enforcing courts and commissions to mean "'material to job performance'". *See* Jowell, *The Administrative Enforcement of Laws Against Discrimination*, 1965 Pub. L. 114, 141 (1965); Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 Vand. L. Rev. 965, 966-1010 (1965).

to carry out the duties of the occupation on the employer's behalf.[29]

A gender-based fetal protection policy, however, in no way involves the employee's ability to carry out assigned duties: Fertile women, so far as appears in the record, produce batteries as efficiently and proficiently as anyone else.

(2) The PDA provides added force to the foregoing points by making it particularly clear that only performance-related considerations can be taken into account when determining whether women of childbearing capacity are to be excluded from job opportunities. In addition to the definitional provision discussed above (at pp. 17-20, *supra*), the PDA provides:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same

[29] The bulk of the bfoq cases involving safety considerations are ADEA cases, and are similar to *Western Airlines v. Criswell, supra*, in that the bfoq was the danger that the employee would not be able to do his or her job properly. *See* cases listed in D. Cathcart, *Five Year Cumulative Supplement to Schlei & Grossman's Employment Discrimination Law* (1989) at 201-202.

While at least one court has held that nonpregnancy is a bfoq for some jobs (there, the position of airline attendant), the reason was that the court's conclusion that a pregnant flight attendant would not be able to perform her duties properly while pregnant. *Levin v. Delta Air Lines*, 730 F.2d 994 (5th Cir. 1984).

Some sex discrimination cases have upheld concerns for customer privacy, or for providing appropriate role models, as bfoq's. *See e.g. Chambers v. Omaha Girls Club*, 834 F.2d 697, 704 (8th Cir. 1987); *Torres v. Wisconsin Department of Health & Social Services*, 859 F.2d 1523, 1531 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1133 (1989); *Jones v. Hinds General Hospital*, 666 F. Supp. 933 (S.D. Miss. 1987). While there are reasons separate from the relationship to job performance that make it controversial whether these cases were correctly decided (*see e.g., Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971)), for present purposes it is sufficient that those cases *do* involve the employee's ability to perform the duties of the job, where those duties involve at least in part providing psychological comfort, assurance, or treatment of some kind.

> for all employment-related purposes. . . as other persons not so affected by *similar in their ability or inability to work* . . . . [Title VII § 701(k), 42 U.S.C. § 2000e(k) (emphasis supplied)].

This clause "explains the application of the general [PDA] principle to women employees." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. at 678 n.14. And, the legislative history of the PDA confirms what the statutory words say: that Congress' intent was to preclude practices that deprive women of job opportunities, temporarily or permanently, because of circumstances relating to childbearing, even though those workers are perfectly able to perform their job.

Thus, one of the "discriminatory practices based upon erroneous assumptions about pregnancy and the effect it has on the capacity of women to work" at which the PDA was directed were instances in which "the employer refused to consider women for particular jobs on the grounds that they might become pregnant, even though the evidence revealed that pregnant women *are perfectly capable of performing the work in question.*" Leg. Hist. at 61 (remarks of Sen. Williams) (emphasis supplied). Congress intended to prohibit such practices by passing the PDA:

> Under this bill, the treatment of pregnant women must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees. [S. Rep. at 4, Leg. Hist. at 41].

See also, e.g., S. Rep. at 6, Leg. Hist. at 43 ("perhaps the most important effect of this bill" is that "employers will no longer be permitted to force women who become pregnant to stop working *regardless of their ability to continue*") (emphasis supplied); Leg. Hist. at 24-25 (remarks of Rep. Hawkins) ("if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers

have done in the past, while they are perfectly able to do their jobs."); *Id.* at 132 (remarks of Sen. Cranston); *Id.* at 131 (remarks of Sen. Biden); H. R. Rep. at 6-7, Leg. Hist. at 152-53.[30]

(3) Congress had compelling reasons for directing that gender-based distinctions in employment generally—and childbearing and pregnancy related distinctions particularly—can be justified only on grounds related to job-performance capabilities.

First, our economic system generally assigns to employers the decisions as to what skills employees must possess to perform a particular job and assumes employer competence to make those decisions. Congress was therefore understandably reluctant uniformly to override such employer judgments concerning the production needs of their businesses. Consequently, as we readily recognize, the bfoq provision leaves limited room for validating such a production-related judgment by an

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[30] The extra cost of employing members of one gender, if any, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. at 716-18 & n.32. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the "decision to forbid special treatment of pregnancy despite the special costs associated therewith." *Arizona Governing Committee v. Norris*, 463 U.S. at 1084 n.14. *See also e.g.* Leg. Hist. 19 (remarks of Rep. Bayh); *id.* at 26- 27 (remarks of Rep. Hawkins); S. Rep. at 9-10, Leg. Hist. at 46-47; Leg. Hist. at 64-65 (remarks of Sen. Williams); *id.* at 97-99 (remarks of Rep. Hatch); *id.* at 130 (remarks of Rep. Biden); H. Rep. at 9-10, Leg. Hist. at 155-56. Consequently, Congress *negated*, as a possible bfoq, the costs associated with compliance with Title VII as amended by the PDA.

Not surprisingly in light of this clear Congressional intent, the employer in this litigation has relied exclusively upon its concern for fetal health and a purported moral obligation to protect the fetus from parental negligence as the basis of its defense, and has *not* pointed to fears of monetary loss through liability for fetal injury or the added costs of further decreasing lead exposure at its facilities as reasons for its policy. *See, e.g.*, Pet. App. 6a, 81a-82a.

employer. (Because even a skill-related/gender-based distinction is at odds with the basic statutory norm, the bfoq provisions do require that the employer's judgment in this regard be based on objective grounds. *Western Airlines v. Criswell*, 472 U.S. at 419, 422-23.)

In contrast, where the employer's reasons for excluding workers from job opportunities on the basis of gender are, instead, *non-job-performance related concerns*—whether involving the health of future generations or otherwise—there is *no* basis for assuming any special employer expertise. And, absent such an assumption, there is *no* reason for permitting an employer decision as to what is best for an employee to override the contrary, and personal, decision of the employee whose job rights would be adversely affected by the employer's decision.

Indeed, once cut loose of the need to prove a job performance-related reason for their actions, employers would be free to express, *at the expense of the basic Title VII proscription against gender-based decisionmaking*, a wide range of otherwise perfectly legitimate, and indeed praiseworthy, ethical and moral concerns. Since each employer could then decide whether and to what degree to make non-job-performance related concerns the basis for sex discrimination which otherwise would violate Title VII (subject, of course, to the statutory requirement that he or she prove that a gender-based distinction is "reasonably necessary" to the achievement of the ethical and moral goals set for the "particular business"), each employer's decision in that regard would simply represent his or her own balance of the statute's nondiscrimination goals against his or her own moral and ethical agenda. That, would tilt the balance Congress struck for the nation as a whole in making elimination of employment discrimination a preeminent societal goal, not subject to defeasance by individual employers.[31]

[31] Judge Posner suggested in his dissent below that tort law concepts may provide appropriate parameters for placing some socially-defined limits on an employer's non-job performance concerns. Pet. App. 66a-67a. If so (*but see* p. 29, *supra*), the fact that no one has pointed to a successful lawsuit against an employer for causing fetal harm indicates that the employer's fetal protection concerns here are *not* sanctioned by common law concepts.

It is true that in recent years courts have determined that children may sue for torts committed upon them before birth. Pet. App. 66a. But it also continues to be true that to recover a plaintiff needs a plausible liability theory. And, as the law stands there is no such theory available where the employer reduces a hazard to a fetus to the degree feasible, warns the mother of any remaining danger to her fetus, and is precluded by federal law from removing the mother from the workplace.

Specifically, under a negligence standard, Johnson Controls could fulfill its duty of care by meeting OSHA standards, taking all actions that a reasonable company would take to further reduce exposure to the risks which an employer reasonably should be aware (such as providing respirators), and taking reasonable care to warn workers about those significant risks of which an employer should be aware. Restatement of Torts (Second) § 388; David Fischer and William Powers Jr., Product Liability Cases and Materials 214 (West 1988).

Under the product liability standard, lead could conceivably be considered an unavoidably unsafe product which is nonetheless reasonable to market because of its social utility. Restatement of Torts (Second) § 402A, comments i, j & k (1965). For such products a manufacturer will *not* be liable for marketing a defective product if the manufacturer issues adequate warnings about those risks not generally known to consumers but about which a manufacturer, held to the standard of knowledge of an expert, should or could be aware. *See, e.g., Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); Restatement of Torts (Second) § 402A comment j (1965). In the situation of substances that pose a risk of fetal harm should a woman become pregnant while exposed, warning the woman satisfies the duty to warn, since it is a physical impossibility to warn a fetus, either potential or actual. *See, e.g.*, cases such as *Needham v. White Laboratories*, 639 F.2d 394, 400-02 (7th Cir. 1981), and 847 F.2d

Second, allowing such atomistic decisionmaking regarding the relative value of the nondiscrimination goal and other valid ethical and moral concerns would open the

door wide to abuses. The more general the inquiry and the broader the exception, the easier it is for an employer to press otherwise laudable non-job-performance related concerns into service as a cover for a desire to eliminate female employees from his workforce and to do so for illegitimate reasons. While it is true that a plaintiff would then have the opportunity to prove that the occupational qualification is not "bona fide," it is likely to prove quite difficult to demonstrate that an employer does not really have a particular, widely shared social or moral goal at heart.

The fetal protection issue illustrates both of the foregoing points. As a practical matter, employers in industries in which *few* women are employed are more likely to be attracted to fetal protection policies than other employers. *See* Paul, Daniels and Rosofsky, *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey*, 16 American Journal of Industrial Medicine 267 (1989); Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237-1241 (1986). In male-dominated industries, there is, from the employer's point of view, little disadvantage to excluding fertile female workers, since male workers are readily available to

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358 (7th Cir. 1988) (setting out duty to warn in case involving transplacental carcinogen).

Thus, in this instance any incorporation of tort liability concepts as an aspect of a bfoq defense reduces, on the one hand, to an argument that Johnson Controls should be allowed to violate the federal prohibition on sex discrimination so that the company can with impunity provide an unreasonably dirty workplace, or can fail to provide adequate warnings to its workers. Acceptance of that argument would simply reduce occupational health for all workers, while condoning discrimination. Alternatively, the liability argument assumes that a state could hold an employer liable in tort *simply* for refusing to exclude the woman from the workplace, perhaps on a negligent hiring theory. If, as we contend here, such an exclusion would violate Title VII, then any such state cause of action would be voided by the preemption provisions of the statute. 42 U.S.C. § 2000e-7, § 2000h-4. *See generally California Federal Savings & Loan Assoc. v. Guerra, supra.*

fill the positions. That being so, a felt concern for fetal health, an unwillingness to incur the additional costs of employing potentially pregant women (such as disability and medical benefits during pregnancy), a reluctance to cleanse the workplace of dangers because of the cost of doing so, particularly where special protective equipment or hygienic facilities for women would be necessary, or a simple unwillingness to employ women because of prejudice or stereotyping could persuade an employer that, on balance, he would rather not employ fertile women.

In contrast, because of the need to retain an adequate workforce, in the *most female-intensive* workplaces, employers rely on having women workers of childbearing age, and may not be able to operate without them. This is why, presumably, fertile women are not likely to be excluded wholesale from jobs as childcare workers, nurses, or dental assistants, among other examples, even though those jobs involve exposure to fetal hazards. Becker, *supra*, 53 U. Chi. L. Rev. at 1238.

Thus, the willingness of employers in male-dominated industries to exclude broad classes of women for fetal protection purposes reflects a subtle assumption that women are nonessential workers, who are better excluded than accommodated. And that assumption is precisely the one that the PDA, in particular, was enacted to preclude. *See* pp. 18-19, *supra*.

Third, permitting employers to justify gender-based exclusions on the basis of non-job-performance related considerations is likely to lead *both* to more discrimination *and* to poor social decisionmaking.

Initially, certain ethical and moral goals, including promoting of child and fetal health, are widely accepted in this society. But it does *not* follow that delegating society's determinations on such matters as the appropriate relative balance between women's employment in-

teresting and fetal health concerns to individual employers is an appropriate response. Individual employers, for example, have no incentive to consider factors that do not involve their workplace directly, and may well exclude women, not to solve—but simply to eliminate the employer's connection to—a complex social problem.

Again, fetal protection provides an appropriate illustration. As one might expect, in passing the PDA, Congress did not insist upon the job capability standard in ignorance of the common-sense facts that pregnant women carry their fetuses within their bodies to the workplace.[32] To the contrary, the fetal health issue that is the subject of this case was specifically raised during the hearings on the PDA. The fear that the bill might increase exposure of women to fetal risks in the workplace was raised, but Congress was not persuaded thereby to alter its requirement that women of childbearing capacity be judged only upon performance-related criteria.[33]

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[32] That fetal protection issues surfaced during the consideration of the PDA is not surprising. The questions were ones receiving attention in the Nation at the time: The OSHA hearings concerning the lead standard, during which, as noted (p. 2, *supra*), reproductive health concerns and the propriety of excluding women from lead-exposed jobs were discussed at length, were in process during precisely the same period that Congress was considering the PDA.

[33] The assumption of those addressing that question was that the bill would indeed require employment of women of childbearing capacity on the basis of their *own* determination whether to work, and the issue addressed was whether that requirement would create occupational health issues affecting the fetus.

For example, during the both sets of hearings, the representative of the United States Chamber of Commerce raised directly the question of employer responsibility for fetal health:

> S. 995 could present job health problems. For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat to the health of either the mother-to-be or the unborn child. [Hearings before the Subcommittee on Labor of the Committee on Human Resources, United States Senate, on S. 995, 95th Cong., 1st Sess. (April 26, 27 and 29, 1977) ("Sen. Hearings") at 110.]

Further, Senator Hatch asked one of primary witnesses in support of the proposed legislation, Dr. Andre Hellegers, "Do you think there would rise a whole slew of OSHA problems, occupational safety and health problems, as a result of pregnant women?" Dr. Hellegers responded:

> Let me put it this way: . . . if we are talking about untoward effects on the industrial process on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that. [*Id.* at 67.]

See also id. at 110 (remarks of Sen. Hatch) ("If we grant this particular bill we may have OSHA problems.").

It is especially pertinent in assessing Congress' approach to the fetal health issue in the PDA to understand that the Legislature realized, as the employer in this case and the Court of Appeals apparently do not, that the relationship between fetal health and female employment is a complex one: There are—as was discussed at length both at the PDA hearings and on the floor of Congress—fetal risks *both* in the processes and materials used in many workplace situations *and* in depriving fertile and pregnant women of income through denial of employment opportunities. Senator Williams put the problem in its fullness as follows:

> . . . Mr. President, I want to emphasize testimony received by the Committee from the American Nurses' Association, and from an eminent obstetrician, Dr. Andre Hellegers, which documented the concrete connection between loss of income during the disability phase of pregnancy and a deterioration of the health of the pregnant woman and of her child which results from impaired access to a healthful life situation.
>
> In addition, there is a relationship between infant prematurity and income. It is estimated that prematurity costs the Nation $1 billion per year for care

> and hospital nursing alone, not to mention the cost of certain lasting effects which can result from prematurity. . . . We must . . . consider the cost which is imposed on society when working women and their families are denied adequate income for a decent standard of living. This cost is felt in terms of medical complications for both the women and the child. [Leg. Hist. 65 (remarks of Sen. Williams).][31]

Thus, Congress did not disregard fetal health concerns in directing that women "perfectly capable of performing the work in question" (Leg. Hist. at 61 (remarks of Sen. Williams)) cannot be excluded from employment opportunities, regardless of their childbearing capabilities. To the contrary, Congress, unlike an individual private employer, was in a position to weigh the *totality of the social concerns* involved in depriving fertile women of employment opportunities, including the risk of long or short-term unemployment or underemployment, and concluded on balance to allow fertile women, like other workers, "to continue working unless their doctors regard them as physically unable to work." Leg. Hist. at 24-25 (remarks by Rep. Hawkins).

(4) It is also very much in point that when the PDA was enacted, Congress had already put in place a mechanism that, unlike employers acting independently, *is* suited to making the complex social decisions involved in

[31] *See also* Leg. Hist. 3 (remarks of Sen. Williams); *id.* at 7 (remarks of Sen. Brooke); *id.* at 116 (remarks of Sen. Williams); *id.* at 170 (remarks of Rep. Sarasin).

The evidence presented in this regard during the hearings was extensive. Dr. Hellegers attached to his testimony a chart showing "the marked *decrease* in *prematurity* as *income increases*", and stressed "the well-known relationship between premature births and subsequent nervous system disabilities, such as mental retardation and learning defects." Sen. Hearings at 75-76. *See also id.* at 64; House Hearings at 54, 58, 59 (similar testimony by Dr. Hellegers). The American Nurses Association also presented a lengthy discussion of the close relationship between maternal income and fetal health. Sen. Hearings at 470-476; *see also* House Hearings, April 6, 1977, at 274-278 (statement of American Nurses Association).

this case. That mechanism is the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* Under that statute, the Occupational Health and Safety Administration has the responsibility to develop occupational health standard protecting "every working man and woman", including fertile women, and the duty to include reproductive health of workers, including the health of the children they bear, within its consideration. 29 U.S.C. § 655(b). *See United Steelworkers of America v. Marshall*, 647 F.2d at 1256. Thus, when Congress decided in the PDA to require employers to hire women capable of bearing children on the basis of their ability to perform the job, then, the Legislature was not relegating fertile women to unregulated workplaces and to unregulated employers free to ignore the dangers for fetal health.

Indeed, as noted (*see* n.32, *supra*), OSHA was considering at the precise time the PDA was before Congress the very question in this lawsuit—whether it is necessary or appropriate to exclude women from jobs involving lead exposure. After holding lengthy hearings, compiling a massive record, and reviewing conclusions by staff members with substantive expertise in assessing different kinds of scientific studies (*see generally United Steelworkers of America v. Marshall*, *supra*), OSHA determined that lead at the blood lead levels which Johnson Controls regards as unsafe for fertile women is also unsafe for male reproduction, but that, without gender-based exclusions, both men and women can have healthy offspring through adequate special protections, including medical surveillance, possible use of respirators, and temporary removal if medically indicated. *See* n.2, *supra*.[33]

The employer here maintains, on the basis of much more sparse expert evidence, reviewed by federal judges with no particular scientific expertise, that OSHA was wrong both about the adverse male-mediated fetal effect,

[33] The index to the OSHA lead standard record alone runs 129 pages. *See* Inorganic Lead H-004 Exhibit List, submitted to the D.C. Circuit in *United Steel Workers of America v. Marshall*, *supra*.

and about the safeguards for women adequate to protect fetal health. The appropriate response is that the problem of reconsidering the proper lead level both for workers generally and for fertile women particularly should go forward not in a series of individual court proceedings, likely to yield disparate results, but before OSHA, the agency Congress designated as the entity to handle the determination of occupational health standards. *See* 29 U.S.C. § 655(b).[36]

In sum, in excluding fetal protection concerns from the bfoq defense Congress was not denigrating the importance of fetal health but rather making one of an interlocking series of decisions as to *how* to most rationally forward that social interest.

D. There is another, overriding reason why Congress could not have intended to include fetal protection concerns within the bfoq defense. The bfoq is limited to "certain" circumstances of the "particular" business. This Court has interpreted that language as requiring that to constitute a bfoq, a job qualification must relate to the business' "essence" or "central mission." *See* pp. 27-28, *supra*. The Court of Appeals holding that fetal protection

[36] For example, in *Johnson Controls v. Fair Employment & Housing Commission*, 218 Cal. App. 3d 517 (1990), the California Court of Appeal, considering the validity under state law of the *same* fetal protection policy at issue in this case, looked at both the *same* expert evidence presented in this case (*see* Jt. App. 72a, submitting into this record testimony from California case); 218 Cal. App. 3d at 519 (citing evidence in this case) and additional expert testimony presented in that one (with full opportunity for cross-examination), and came to quite the opposite conclusion as to the scientific facts regarding lead. *See* 218 Cal. App. 3d at 537-38.

The present point is not that the California court was right and the Seventh Circuit wrong (although we believe that to be the case, particularly on a summary judgment record where the only question is whether there is a material issue of disputed fact), but that the two courts, considering much the same evidence, came to quite opposite conclusions on a scientific question as to which neither had any expertise, and as to which there *is* a federal expert agency which has already answered the very same questions.

is part of the "essence" of Johnson Controls' business, based on reasoning that would apply to a broad range of businesses, would permit widespread violation of the basic PDA prohibition against discrimination against women based on their childbearing capacity. That result is contrary to Congress' intent that the bfoq be a narrow exception to Title VII.

The number of workplace situations in which there may be some particularized risk to fetal health is extensive:

> [P]otential [fetal hazards] in the modern workplace rang[e] from toxic chemicals in the office, to biological hazards in the hospital and laboratory, to pesticides on farms, to heavy metals such as lead, cadmium, and mercury in industry, according to a number of experts. In addition . . . some health professionals have suggested that radiation emitted by video display terminals, stress, and noise may be possible factors in reproductive problems. [Bureau of National Affairs, *Pregnancy and Employment* ("BNA") (1987) p. 62.].

See generally U.S. Congress, Office of Technology Assessment ("OTA"), *Reproductive Health Hazards in the Workplace*, pp. 69-126 (1985).[37] While the precise number of workers exposed to hazards to which fetuses are especially sensitive can only be estimated, a 20 million figure has been accepted by the EEOC (*see* 45 Fed. Reg. 7514 (1980)), and, given the range of industries affected, does not seem at all out of line.

[37] Some of the industries in which there is substantial evidence of fetal risk include those in which women have traditionally been most heavily employed, including hospitals and childcare centers. *See* BNA, *supra*, at 68, 86-87; 19 Occupational Safety and Health Reporter 1223 (December 6, 1989) (between 25% and 60% of preschool children cared for in daycare centers have a virus that is harmless to them, but which, if it infects female childcare workers during the first 21 weeks of pregnancy, places the fetus at an increased risk of about 15% of permanent neurological damage). In addition, new technologies have been implicated as fetal hazards. *See* BNA, *supra*, at 82-83.

Moreover, as Judge Easterbrook noted in dissent below (Pet. App. 92a), if an employer's concern for fetal health justifies overriding a woman's own informed judgment concerning whether working entails an unreasonable risk to a fetus she may be carrying, there is *no* reason why that concern can be lawfully exercised only in situations in which the fetus is at heightened risk, as compared with the mother. Rather, it would appear that an employer could assert that concern with regard to situations presenting equal risks to *both* women and their fetuses on the ground that the woman is entitled to expose herself to potential injury. but should not be permitted so to expose her fetus. As here. the employer could maintain a moral responsibility for the fetus; alternatively, liability considerations such as those suggested by Judge Posner in dissent below would not differ depending upon whether or not the fetus was harmed by factors to which fetuses are especially sensitive. Thus, if considered a bfoq, the fetal protection concern would permit exclusion of women from almost all non-sedentary positions, including jobs that involve driving cars or trucks.[38]

In short, as Judge Easterbrook explained below, if employers are permitted to regard perfect fetal safety, without more, as a bfoq, "the law would allow employers to consign more women to 'women's work,' while reserving better-paying but more hazardous jobs for men." Pet. App. 100a. The result would be gravely to compromise Congress' intent to "permit the 36 million working American women to assume their rightful place, and make a full contribution to our Nation's economy" by

[38] The potential of the Court of Appeals' rationale to exclude women from the workplace is further increased by that court's acceptance of the basis upon which the employer here has sought to justify exclusion of *all fertile women*, rather than exclusion of pregnant women only: that "frequent 'unplanned or undetected pregnancies' are 'one of the exigencies of life'" (Respondent's Brief in Opposition at 3-4); such pregnancies are certainly not limited to "certain circumstances" or to the essence of any "particular" business.

"providing effective protection against discrimination on the basis of their childbearing capacity." Leg. Hist. 61-62 (remarks of Sen. Williams).

E. Finally, the Court of Appeals' bfoq analysis contravenes the statutory language of the bfoq provision, as well as this Court's construction of that language, for yet another reason: As this Court explained in *Western Airlines v. Criswell*, 472 U.S. at 412-17, only where the employer is "compelled" to rely on gender "as a proxy" is the resulting policy a "bona fide" policy "reasonably necessary" to a business' "normal" operation.

(1) To meet this standard there must be some exclusively gender-linked concern upon which the policy is based, rather than a concern applicable to both genders. Where that condition is not satisfied, the gender-based distinction is not "compelled," and therefore not "bona fide" nor "reasonably necessary" to the business. *See Dothard v. Rawlinson*, 433 U.S. at 336 (special threat because of "employee's very womanhood"). In this case Johnson Controls' fetal portection policy is essentially one of perfect protection; *viz.*, of assuring that there is *no* risk of fetal injury. To meet the "bona fide" and reasonably necessary standards the company must show that the same perfectionist approach to other health issues in its workplace does *not* require the exclusion of males.[39]

[39] As the Eleventh Circuit, in *Hayes, supra*, recognized "a certain amount of subtle bias . . . has focused research on the hazardous effects of workplace substances as they pertain to reproductive health on women more so than on men." 726 F.2d at 1548-49, *citing* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 Geo. L. J. 641, 661 (1981). The *Hayes* solution to the skewed research problem was to hold that "In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women." 726 F.2d at 1549.

This approach cannot be squared with Title VII: As this Court held last year in *Price Waterhouse v. Hopkins, supra*, once an employer has engaged in gender-based discrimination, the burden of

In concluding that the employer had carried the burden of proving that its fetal policy is a bfoq on this summary judgment record, the Court of Appeals did *not*, however, consider the legally critical questions whether the company had proven, without any material dispute of fact, that adult human beings and their live children are in no danger due to lead exposure at the levels considered dangerous for fetuses, and whether *only* fertile women (and not fertile men) present a danger of fetal risk due to lead exposure. Pet. App. 50a-59a. Plainly, the company did *not* carry this burden of proof beyond material dispute: Plaintiffs' experts testified at length, pointing to scientific studies and to governmental documents, that lead at the levels the company considers safe for adults entails serious health risks for those exposed, including danger of cardiovascular disease, nonfetal reproductive injury, and neurological effects. *See* nn. 5-7, *supra*. And as to male-mediated fetal health effects, whether or not the plaintiffs' evidence in this regard was sufficient to prove that there *is* such an effect (which we believe it was) (*see* Pet. App. 33a-36a), it was certainly sufficient, especially in combination with OSHA's conclusion that there *is* such an effect, to raise a substantial factual question regarding an issue as to which the burden was on the *employer*.[40]

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establishing any justification is on that *employer*. That necessarily means that where the issue is uncertain, the defendant loses, a result fully consistent with the proscription upon gender-based decisionmaking that is at the core of Title VII. Indeed, since the research bias itself may reflect in part stereotypical ways of thinking about and conducting research on, women, allowing employers to rely on one-sided research would be particularly contrary to Title VII's purposes.

[40] The Court of Appeals did review the male-mediation issue as part of its business necessity analysis, putting the burden of persuasion *on the plaintiffs*. *See* n.7, *supra*. In so doing, that court refused to accept as pertinent animal studies proferred by plaintiffs' experts in support of the proposition that there are male-mediated fetal risks. Such studies are widely accepted by OSHA and other federal agencies to make risk assessments, and by scientists in general, (*see, e.g.*, Academy of Sciences and National Research Council, *Risk Assessment in the Federal Govednment: Managing the Process* 22 (1983); Toxic Substances Control Act, 15 U.S.C. § 2603(b)(2)(A); 43 Fed. Reg. 52952 (OSHA lead standard)) and therefore should be recognized as probative evidence under Fed. R. Evid. 401. Moreover, human studies proving directly male-mediated risks are extremely difficult to conceive and to carry out, and are in fact rarely undertaken for those reasons as well as because of a tendency to conceive of fetal injuries as a problem most probably traceable to the mother. *See* Jt. App. 256 (Legator) (because of the nature of the problem there will probably never be direct human studies of male mediated human risks); Office of Technology Assessment, *Reproductive Health Hazards in the Workplace, supra*, at 8.

(2) Certainly the *Western Airlines v. Criswell* standard also requires that a gender-based policy be the narrowest practicable means for meeting the valid interest at stake. The Court of Appeals did not even put Johnson Controls' fetal protection policy to that test much less show that the policy passed.

For example, while fetal health cannot be tested directly, there is a readily available practical alternative:

Although petitioners therefore raised the propriety of the Court of Appeals ruling as one of the "questions presented" in the Petition of Writ of Certiorari (at i), in opposing *certiorari* respondents conceded that "*of course* animal studies can constitute an important predictive tool in appropriate cases" (Respondent's Brief in Opposition, at 23 (emphasis added)), and maintained only that the Court of Appeals had excluded the animal studies proferred not as a matter of law but as a matter of fact. That is not the case, both for reasons explained in Petitioners' *Certiorari* Reply Brief, at 9 n.6, and because these were summary judgment proceedings, so that the Court of Appeals was in no position to choose between competing experts as to the propriety of relying on particular animal studies. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-50, 255 (1986).

Because respondent has *conceded* the legal issue concerning animal studies raised in the petition, and because, in any event, under the analysis is this brief the *plaintiff* has *no* burden to prove male-mediation, in regard to question 2, we rely on the points made in this footnote. *See also*, discussing the question of the propriety of reliance on animal studies in legal proceedings, Brief Amicus Curiae of Natural Resources Defense Council et al. on Behalf of Petitioners.

viz, frequent bloodtesting.[41] The company already provides for monthly individual blood testing of new employees (Jt. App. 124), yet justifies its failure to offer monthly individual blood testing to fertile women, rather than excluding them from the workplace entirely, on the ground that those employees are unfamiliar with the job, and may, between tests, store up enough lead in the body to be dangerous if the woman becomes pregnant soon thereafter (Pet. App. 101a).[42] But that is at best a remote contingency.[43]

Since the exclusion the company wishes to justify is an extraordinarily broad one, and is directly contrary to the individual treatment value at the core of Title VII, the company cannot meet its burden of proving the reasonable necessity of its *discriminatory* policy without demonstrating that the available *nondiscriminatory* alternatives are not only less protective, but *significantly* less protective. Otherwise, while it may be " 'convenient' " or " 'reasonable' " (*Western Airlines v. Criswell*, 472 U.S. at 414) for the employer to dispense with individual blood testing, warnings, and training in favor of excluding women there is no "compelling" need to do so (*id.*).

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[41] In addition, the employer has never provided *any* basis for regarding exclusion of women from *non*-lead exposed jobs which happen to be in the same lines of progression as lead exposed jobs as "reasonably necessary" to its business.

[42] The company does not explain why inexperienced male employees are not also in at least some danger of incurring blood lead levels above those considered safe for them, or of bringing home lead dust on their clothes and exposing their children. (*See* Jt. App. 158, 163 (Fishburn); 174-75 (Chisholm); 183 (CDC Report) (41.8% of children tested whose parents worked in lead exposure had blood lead levels of 30 μg/dl or more).

[43] Lead stores in the body only after exposure for some period of time. Moreover, to create the danger feared, a woman soon after assignment to a lead exposed job would have to ignore adequate warning regarding fetal health issues *and* become pregnant within months of starting a new job, *and* not pay attention to the careful training of employees newly assigned to lead-exposed positions, when they generate a high blood lead reading.

* * * *

For all these reasons fetal protection policies do not, as a general matter, come within the bfoq defense and, on this record, Johnson Control's exclusion of all fertile women can not possibly be said to be saved by the bfoq.[44]

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[44] As the plurality opinion in *Price Waterhouse v. Hopkins*, *supra*, noted, "some courts"—namely, the court below, as well as the *Hayes v. Shelby Memorial Hospital*, and *Wright v. Olin Corp.*, courts—have suggested that there is in addition to the bfoq an implicit affirmative defense where an employer takes the position that "its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy." 109 S. Ct. at 1789. The attempt to avoid the bfoq analysis discussed in the text was most fully articulated in *Hayes v. Shelby Memorial Hospital*, *supra*, a case involving exclusion of *pregnant* women only.

In general terms the *Hayes* court held that where an employer claims aneutral purpose for an explicitly gender-based policy excluding women alone from employment opportunities, illegal facial discrimination will only be presumed; if the employer can bear the burden of demonstrating affirmatively that the employer's purpose is a substantial one that can by its nature be satisfied only by burdening one gender but not the other, the *Hayes* court concluded, the policy is in fact a neutral one, although expressed in gender-based terms.

This case in contrast to *Hayes* is one in which the employer policy at issue burdens *all fertile women* and does so without any showing that nothing less will fairly meet the employer's safety concern. There is, consequently, no need to consider directly in this case, as there was in *Hayes*, whether the statutory bfoq is the only affirmative defense that applies to a distinction based upon *pregnancy as such*.

We observe, however, that there is no ground, given the PDA, for reading a new statutory defense into Title VII for pregnancy-based distinctions. The PDA defines the term "on the basis of sex" as including "on the basis of pregnancy" for purposes of all of Title VII. The bfoq concerns those situations in which Congress determined that it is lawful to make hiring and employment decisions "on the basis of sex." In light of the PDA, § 703(e) necessarily covers employment distinctions made "on the basis of pregnancy, childbirth, or related medical conditions." Thus, Congress *did* address the question whether and under what circumstances pregnancy-based hiring and employment decisions are justified. There is no more basis than there is with regard to any other form of

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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sex discrimination for reading into Title VII an additional exception for pregnancy-based exclusions that Congress declined to enact.

Moreover, under the *Hayes* approach, the relevant defense that does appear in Title VII, the bfoq, would have no function. The role of the bfoq defense is precisely to describe the circumstances under which the employer is entitled to favor one sex over another because that sex inherently has some characteristic the other sex does not have. The *Hayes* approach is directed at the same problem. Yet, under *Hayes*, the bfoq's requirements as carefully spelled out by Congress would become irrelevant, since all cases that could come within the bfoq would be redefined as not involving facial discrimination at all, before the bfoq defense was ever reached.

RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; Naue-JCA Objekt Bochum GmbH & Co. KG; JCI SDN BHD; E.A.U. Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corp.; Pannabco; Pannesma; Fanini F.A.I.N. SpA; Lapeer Trading Co.; IllumElex Corporation; and Seating Systems Technology, Inc.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were, as plaintiffs-appellants, the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present, and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.; as intervening plaintiff-appellant, Local 322, Allied Industrial Workers of America, AFL-CIO; and, as the defendant-appellee, Johnson Controls, Inc.

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COUNTERSTATEMENT OF THE CASE

Title VII embodies a "balance of rights." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989) (plurality opinion). In this case, gender equality in the workplace must be balanced against threats to the health and safety of unborn children from toxic manufacturing operations. This Court's review of the balance struck by Johnson Controls and approved by the courts below requires careful consideration of the factual and procedural background. Yet the UAW's brief repeatedly either misstates or ignores the nature of the industrial safety risks in question, how Johnson Controls has responded to those risks, and how the courts below evaluated the record evidence and the legal issues. The UAW also attempts to sidestep its own concessions and waivers of material issues that it now belatedly seeks to raise.

A. The Substantial Risks Of Irreversible Injuries To Unborn Children Through Maternal Exposure To Lead

The UAW conceded below that it is "clear" the record evidence establishes a "substantial risk of harm to the fetus" from lead exposure. UAW Seventh Cir. Br. 33. Now, however, it seeks to recharacterize the safety issue as simply a "theoretical risk of fetal cognitive deficit" that might cause " 'very subtle' learning problems" later in life. UAW Br. 5 n.5, 21. This recharacterization is untenable.

1. As both the District Court and the Court of Appeals found, there is overwhelming evidence that, at the levels at issue in this case, lead in a pregnant woman's body poisons the fetus's developing brain and central nervous system. Lead "transfers" from the woman's blood across the placenta to the fetal circulatory system; "[b]ecause the fetus' blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother." Pet. App. 12a & n.13 (citing evidence). As described by one of the UAW's experts, once in the fetus's blood, lead in the doses at issue here causes "substantial irreversible cellular and functional

damage to the brain" and central nervous system. Silbergeld Dep., JA 240; see also Fishburn Test., JA 148-150; Chisolm Dep., JA 167 ("Lead binds to and is retained by an infant brain, that is the difference between an infant brain and an adult brain"). These effects are "irreversible" because "the brain is not capable of cellular repair." Silbergeld Dep., JA 229; see generally Pet. App. 12a-17a; JA 5-9, 15-16.[1]

The results of such damage are devastating. They have variously been characterized as including irreversible "retarded cognitive development," Chisolm Aff. ¶ 6, JA 199; permanent "intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities," Scialli Aff. ¶ 7, JA 180; "damage to the higher brain function resulting in decreased neuro-behavioral development," Whorton Aff. ¶ 8, JA 187; and a "clear decrement in the subsequent mental development of the infant," Hammond Aff. ¶ 3, JA 72. Far from "theoretical," UAW Br. 21, the risk of such injuries from the maternal blood lead levels involved in this case was established below to be "large," "substantial," and "grave."[2]

The effects of such injuries are " 'very subtle,' " UAW Br. 5 n.5, only in the sense that they "may not fully manifest themselves until the child is diagnosed as having learning

[1]Two explanations have been offered for the heightened susceptibility of the developing fetal brain to lead. First, a fetus (like a small child but unlike an adult) has not yet developed a "barrier" that would prevent lead from entering its brain directly from its blood. Fishburn Test., JA 148-151. Second, "because the immature brain is taking up calcium more rapidly than the mature brain" due to "a difference in the rate constance of the calcium transport system," there is a "more extensive uptaking of lead by the immature brain." Silbergeld Dep., JA 231.

The dangers of lead ingestion in young children have long been noted. "[T]he fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child." Chisolm Aff. ¶ 6, JA 199; see also Scialli Aff. ¶ 5, JA 180.

[2]See, *e.g.*, Fishburn Test., JA 158; Fishburn Test. 74, attached to Jaspan Aff. (R.38); Scialli Aff. ¶ 10, JA 181; Chisolm Aff. ¶ 6, JA 199; Whorton Aff. Ex. C, JA 193-194; Hammond Aff. ¶ 3, JA 72. See also Pet. App. 12a, 20a, 32a; JA 15-16, 20.

problems in a school setting some five to six years after birth," Pet. App. 16a. At that point the child

> " 'discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child pe.haps toward the end of the first grade, particularly in the second grade.' " Pet. App. 16a (quoting Chisolm Dep., JA 171).

2. These injuries cannot be avoided simply by waiting to remove a woman from exposure to the lead levels in issue until she decides to become pregnant. First, it would be irresponsible to ignore the fact that, in the Court of Appeals' words, frequent "unplanned or undetected pregnancies" are "one of the exigencies of life." Pet. App. 10a.[3] Second, lead is an "accumulative toxicant"—because it builds up in the blood and soft tissues and is stored in the bones, blood lead levels may take two or three times as long to decrease as they do to increase. And because the bones decalcify during pregnancy to nourish the developing fetus, "stored lead" is "transferred" to the fetal brain long after the mother's removal from lead exposure. Pet. App. 17a-19a (quoting evidence). As UAW expert Ellen Silbergeld observed, the fetus remains in danger because "[f]or all purposes there is continuing exposure to lead even after removal from sources of lead." JA 232.[4]

[3]See also Chisolm Aff. ¶ 9, JA 200; Scialli Aff. ¶ 11, JA 181-182. The fetus may suffer severe harm between the time of conception and the time pregnancy is detected. Moreover, it is believed that lead is stored in the placenta " 'during the early stages of pregnancy to be released [later] when the placenta becomes functional.' " Pet. App. 19a & n.24 (citations omitted); see also Fishburn Test., JA 161; Fishburn Test. 22, 26-27, attached to Jaspan Aff. (R.38).

[4]See also Whorton Aff. Ex. C, JA 193 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant body lead burden would pose a potential hazard to any conceptus for many years after exposures");

It was precisely because of this continuing threat to "the growing brain of the fetus" that the Centers for Disease Control, U.S. Department of Health and Human Services, announced several years ago that "[t]he prevention of lead exposure to the fetus needs special emphasis. *Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*" CDC, *Preventing Lead Poisoning in Young Children* (1985), JA 183-184 (emphasis added).

3. In promulgating its 1978 occupational lead-exposure standard, see 29 CFR § 1910.1025, the Occupational Safety and Health Administration (OSHA) recognized, on the basis of the evidence then available, that a fetus's blood lead level should not exceed 30 micrograms per deciliter of whole blood (μg/dl).[5] However, OSHA's standard generally requires an employee's removal from a high-lead work environment only where his or her blood lead level is at or above 50 μg/dl, a level far higher than that conceded to be dangerous to fetal health. See 29 CFR § 1910.1025(k)(1)(i)(D). Although OSHA expressed the hope that other measures such as employee education and additional biological and air monitoring could further reduce fetal risk, see 43 Fed. Reg. 52,966 (1978), its maximum lead absorption limit

Scialli Aff. ¶ 12, JA 182 ("during the nine months of gestation the fetus will be exposed to harmful levels of lead from the mother's blood despite removal of the mother, thus creating a significant risk that the child will be born with a neurologic injury"); Chisolm Aff. ¶ 10, JA 200-201 ("if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered"); Silbergeld Dep., JA 232 ("within a year or so there would be a reduction in lead").

[5]OSHA noted that "[t]he Center for Disease Control, the Toxicology Committee of the National Academy of Sciences and the Environmental Protection Agency recommend that blood lead levels of children be kept below 30 μg/100 ml. Certainly the fetus and newborn should be similarly protected." 43 Fed. Reg. 52,966 (1978). OSHA also found "conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues," that "the fetus is highly vulnerable whatever the stage of development," and that "[t]he fetus is particularly susceptible to neurological damage." *Id.*, at 52,965-52,966.

for adults clearly does not avoid the fetal injuries described above —as UAW experts themselves emphasized. See, *e.g.*, Legator Dep., JA 257. Indeed, OSHA cautioned that individual company safety practices might need to be "more stringent than the specific provisions of the [lead] standard" and that company physicians might in certain instances need to remove women from high-risk positions precisely "so that prior lead exposure will not harm the fetus." 29 CFR § 1910.1025 App. C, p. 182 (1989); 43 Fed. Reg. 52,974; see also *id.*, at 52,966.[6]

4. It is the fetus's *direct* exposure to the maternal blood lead levels involved here that causes the injuries described above. The UAW unsuccessfully sought below to create a genuine factual dispute as to whether equivalent fetal injuries are *genetically* caused by malformed sperm ("teratospermia") from male workers *with equivalent blood lead levels.* As the Court of Appeals concluded, the evidence of such an equivalent risk "is, at best, speculative and unconvincing." Pet. App. 34a.

Specifically, the available evidence (including OSHA's 1978 rulemaking record) suggests that men with roughly equivalent blood lead levels may have an elevated risk of temporary reduction in fertility—*i.e.*, decreased number of sperm ("hypospermia") or sperm with decreased motility ("asthenospermia")—a problem that can be monitored and corrected on an individualized basis without permanent reproductive injuries. The evidence, however, establishes that risks of birth defects or other fetal injuries caused by deformed sperm occur, if at all, only at much *higher* paternal blood lead levels than those in issue.[7]

[6]OSHA also recommended the removal in certain instances of men planning to father a child, but for distinctly different reasons. Whereas removal of a woman would be necessary "so that prior lead exposure will not harm the fetus," the reason for removing men would be "so that their sperm can regain sufficient viability for fertilization." 43 Fed. Reg. 52,974.

[7]OSHA, for example, has noted that while hypospermia and asthenospermia have been detected at 41 μg/dl—11 micrograms above

Those higher levels are avoided through compliance with OSHA's maximum lead absorption limits applicable to all employees. OSHA's limits do *not* prevent the fetal injuries described above, which result from the fetus's unique dependence upon the maternal environment and are inflicted at much lower blood lead levels.[8]

The UAW also sought to rely on rodent studies in positing that male-transmitted fetal injuries might occur at lead levels comparable to those involved here. The evidence, however, established that those studies cannot be extrapolated to humans given the material differences between human and rodent reproductive systems. See Pet. App. 34a & n.29. Even UAW experts ultimately conceded that the evidence of "male-mediated" risks at the lead levels in question is, at best, speculative: as one acknowledged, "[w]e don't know" whether such risks really exist, Brix Dep., JA 265; another agreed that male-mediated harm is "an unknown in terms of the precise levels," Legator Dep., JA 257.[9] That is a far

Johnson Controls' initial maximum allowable limit for fertile women—teratospermia (malformed sperm) have been detected only at the much higher level of 53 μg/dl, more than twice the maternal blood lead levels now known to pose substantial dangers of direct and irreversible harm to fetuses. See App. C to 29 CFR § 1910.1025, p. 185. The discussion of the OSHA rulemaking record in *United Steelworkers* v. *Marshall*, 208 U.S. App. D.C. 60, 127-128, 647 F.2d 1189, 1256-1257 (1980), cert. denied *sub nom. Lead Industries Ass'n* v. *Donovan*, 453 U.S. 913 (1981), similarly points to no evidence of fetal injuries caused by male blood lead levels equivalent to those involved in this case.

[8]On the absence of male-mediated fetal harm at the blood lead levels in question, see generally Pet. App. 33a-35a; JA 15-16, 20; Chisolm Aff. ¶¶ 7-8, JA 199-200; Scialli Aff. ¶¶ 8, 10, JA 180-181; Hammond Aff. ¶¶ 7-8, JA 72-74; Whorton Aff. ¶¶ 6-7, JA 186; Chisolm Dep., JA 171-176; Fishburn Test., JA 154-157; Fishburn Test. 88-89, attached to Jaspan Aff. (R.38).

[9] Another UAW expert asserted that, while he had done no independent studies or examinations in this regard, he believed the scientific literature he had seen showed that male-mediated risks are analogous to the risks *in utero* at comparable blood lead levels. The expert then was asked to review the literature he had in mind on an article-by-article basis. As he conceded, each article either involved male blood lead levels

cry from the "overwhelming evidence" and " 'general consensus within the scientific community' " as to the irreversible destruction caused by fetal exposure to the maternal blood lead levels here in issue. Pet. App. 20a (citation omitted).

5. The health risks to fetuses are significantly greater than those to adults at these blood lead levels. *First*, as UAW expert Marvin Legator explained, there is "[n]o question" that fetuses and young children are "certainly" more sensitive to lead than adults. JA 253-254; see also JA 16; Chisolm Aff. ¶8, JA 200; Whorton Aff. ¶ 9, JA 187; Fishburn Test., JA 148-151; CDC, *Preventing Lead Poisoning in Young Children*, JA 183-184; n.1, *supra*.

Second, adult effects such as mood swings, high blood pressure (which can lead to increased risk of heart disease), and temporarily reduced male fertility can be and are monitored and controlled; when ill effects in employees are detected, corrective actions, including removal when necessary, can be and are taken.[10] Such individualized monitoring of the effects of lead is impossible with a fetus. See Scialli Aff. ¶ 6, JA 180; see also Fishburn Test., JA 151, 154, 161-162. Moreover, while the adult effects are reversible with proper monitoring and corrective actions, the injuries to a fetus's developing brain and central nervous system are not. See Scialli Aff. ¶ 10, JA 181; *supra*, at 1-3.

B. Johnson Controls' Responses To These Risks

Johnson Controls is a manufacturer of automotive and specialty batteries. The use of lead is unavoidably an integral part of its operations because "[l]ead is the principal active material used

much *higher* than those at issue here or else "did not attempt to guess what those blood-lead levels might have been." Silverstein Dep., JA 212; see also *id.*, at 204, 206, 209, 211-215, 217-221. His affidavit ultimately took a different tack: rather than asserting *evidence* of male-mediated risk at the levels in question, it concluded that the *absence* of additional studies justified a *presumption* of such risk. Silverstein Aff. ¶ 4, JA 261-262. This is the same approach followed in the *amici* brief of the American Public Health Association, *et al.*

[10]See Fishburn Test., JA 147-148, 153, 162-163; Fishburn Test. 20, attached to Jaspan Aff. (R.38); Beaudoin Test., JA 89-91; JA 114-137.

in batteries. It is the main ingredient in the paste which forms the plates of the batteries, and it forms the structure for all the conductive elements in the battery for transmitting current." JA 4.[11]

Johnson Controls has long been a recognized industry leader in its comprehensive efforts to protect employees and their families from the adverse effects of lead.[12] The company's programs, which long predated OSHA regulation in this field, exceed OSHA's current requirements in numerous respects and have reduced the blood lead levels of its employees well below OSHA's projected target levels. See Beaudoin Test., JA 92-93, 97; JA 145-146. As the courts below found, however, neither Johnson Controls nor anyone else has to date been able "to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women." Pet. App. 9a; see also JA 17 ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels").

As one part of its broader industrial safety efforts, Johnson Controls implemented its first fetal protection policy in 1977. Although that policy "stopped short of excluding women capable of bearing children from lead exposure," it strongly recommended that women *not* work in high-lead areas if they were considering a family. JA 138. Women received individualized

[11]Johnson Controls "has attempted to develop an alternative to lead acid batteries in order to totally eliminate lead exposure; however, these attempts have been completely unsuccessful to date." Beaudoin Aff. ¶ 17, JA 78; see also Pet. App. 59a n.43 (no lead-free battery is presently available).

[12]These long-standing efforts include elaborate engineering, ventilation, and workplace inspection controls; extensive biological monitoring, medical surveillance, and employee counseling and education programs; detailed programs for respirator use, employer-provided clothing and shoes, personal hygiene, improved work practices, and paid wash-up and shower time; and the transfer to other positions of employees who show signs of excessive lead absorption (with no reduction in pay or other benefits). See, *e.g.*, Pet. App. 3a-4a; Beaudoin Test., JA 87-102; Beaudoin Aff. ¶ 6, JA 76; JA 104-137 (reprinting various programs).

health counseling from company medical personnel and were asked to sign a statement that the company had explained the childbearing risks of high-lead exposure—not in an attempt to effect a waiver, but "as a means of emphasizing the gravity of the situation." Beaudoin Test., JA 95; see also JA 138-144. Johnson Controls tried this program for five years but found a continuing situation in which, notwithstanding its best efforts, "number one, a high number of women who were capable of bearing children [had] high blood leads and, even more to the point, we were seeing a substantial number of pregnancies where the blood leads of the mother were well in excess of 30 [μg/dl]." Beaudoin Test., JA 94; see also Beaudoin Aff. ¶ 16, JA 77-78; Beaudoin Aff. Ex. K (R.37). At least one of the infants born to this group showed early signs of fetal lead poisoning. See generally Pet. App. 6a-8a.

Based on the failure of these earlier attempts, in light of the growing evidence of the substantial health risks involved, and at the specific urging of its plant physicians and outside medical consultant, Johnson Controls in 1982 adopted the fetal protection policy at issue in this case. See JA 94, 153; see also JA 80-86. As described in further detail by the Court of Appeals, the policy generally prohibited women who are capable of bearing children from working in jobs where there was a likelihood that their blood lead levels would rise above 30 μg/dl—the Centers for Disease Control's standard then in effect. Pet. App. 5a-6a & n.7.[13] Employees covered by the policy who already were in such high-risk positions were permitted to remain in those positions if they were able to maintain their blood lead levels below 30 μg/dl; those who could not were transferred to other positions and paid medical removal protection ("MRP") benefits to compensate for

[13]Although the UAW now argues that Johnson Controls might have used other methods in determining likelihood of high blood lead levels in particular positions, see UAW Br. 3-4, 47-48, it made no such argument to the Court of Appeals and, as that court found, thereby waived the issue. See *infra*, at 12-13, 45-48.

lost earnings.[14] Women who were not then in high-risk positions were not allowed to transfer into them.[15]

Since 1982, Johnson Controls has continued to implement engineering controls to reduce the lead exposure and blood lead levels of all employees, and it continues to review, update, and refine its program in light of the best available medical evidence so as to reduce fetal health risks while minimizing the effect upon fertile women.[16]

C. The Proceedings Below

In the District Court, the parties stipulated to the certification of a class consisting of certain past, present, and future employees affected by the fetal protection policy. After the parties had been given a full opportunity for discovery, Johnson Controls moved for summary judgment and submitted extensive evidence, including the deposition and affidavit testimony of eminent medical

[14]Significantly, whereas OSHA only requires the payment of MRP benefits for 18 months after transfer (29 CFR § 1910.1025(k)(2)), a woman transferred under Johnson Controls' policy receives MRP benefits indefinitely until she either no longer is capable of childbearing or declines to accept a position equal in pay, benefits, and seniority to the one from which she was transferred. JA 81, 97.

[15]Johnson Controls does not encourage sterilization. Its policy expressly cautions that it "is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action." JA 80, 86.

[16]Two changes are of particular note. *First*, Johnson Controls' 1982 policy extended to jobs in "lines of progression" that contained high-risk positions. Although this provision was not at issue below, we call to the Court's attention that it was eliminated after the record in the case had been closed; the policy now is applied only on an individual job-by-job basis. (The provision was not at issue below because it applied only to *applicants* and thus did not affect the certified class—*employees*—represented by the UAW. Nor did the UAW challenge the provision in the Court of Appeals.)

Second, and also after the record had been closed, Johnson Controls lowered the policy's action level from 30 to 25 μg/dl in response to the CDC's revision of its recommended maximum "umbilical cord blood level[ ]" for lead. See *supra*, at 4; JA 183-184. Johnson Controls called both of these changes to this Court's attention in its brief in opposition (at 8 n.16) to the UAW's petition for certiorari.

experts documenting lead's toxic prenatal effects and the need for the company's policy.[17]

The District Court followed the lead of the Fourth and Eleventh Circuits in adopting a modified "business necessity" analysis which, like a BFOQ analysis, placed on Johnson Controls the burden of demonstrating (1) substantial risks of fetal harm at the blood lead levels in issue and (2) that transmission of that harm occurs through female but not male employees at these levels. JA 10-14.[18] The District Court found the record evidence created no *genuine* dispute with respect to either issue: the risks are substantial and "too serious for this Court to find unimportant," and at the 30 μg/dl level "this expo-

[17]Dr. J. Julian Chisolm, Jr. (JA 165-178, 198-201) is Director of the Lead Program at the John F. Kennedy Institute in Baltimore and Associate Professor of Pediatrics, Johns Hopkins School of Medicine. He operates a clinic for the treatment of children with lead poisoning and has authored over 70 journal articles, book chapters, and conference papers on lead poisoning, most of which focus upon the prenatal and childhood effects of lead exposure. JA 198-199; Ex. B to R.42. Dr. Anthony R. Scialli (JA 179-182) is Director of the Reproductive Toxicology Center in Washington, D.C., which "serves as a source of information on the potential reproductive toxicity of environmental and physical agents." JA 179. An obstetrician, he has done extensive research on the effects of lead on reproductive health. Dr. M. Donald Whorton (JA 185-187) is Associate Clinical Professor of Occupational Medicine at the University of California School of Public Health in Berkeley and Senior Occupational Physician/Epidemiologist at Environmental Health Associates, Inc. in Oakland, California. One area of his research has focused upon the effects of lead exposure on semen quality. JA 185-186. Dr. Paul B. Hammond (JA 71-74) is Professor of Environmental Health at the University of Cincinnati. He has done substantial research on lead toxicity and has directed a study analyzing the impact of *in utero* and postnatal lead exposure upon the subsequent mental development of children. JA 71-72. Dr. Charles W. Fishburn (JA 147-164) is Assistant Clinical Professor at the Universities of Wisconsin and Colorado in their Departments of Preventive Medicine. He is board certified in occupational medicine, has evaluated over 25,000 individuals for lead exposure, and has treated several thousand patients for the effects of lead poisoning. Fishburn Test. 3, 8-9, attached to Jaspan Aff. (R.38).

[18]See *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548-1549 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190-1191 (CA4 1982).

sure exists only for pregnant women. Men simply cannot expose a fetus to lead in the same way women can." *Id.*, at 18, 20.[19]

On appeal, the UAW argued that gender-based fetal protection measures should be evaluated only on a BFOQ standard and declared unlawful *per se* under Title VII. The UAW also advised the Court of Appeals that it had decided to pursue only the factual issues involving relative safety risks; these issues were "the *only* ones that will determine the outcome of this case." UAW Seventh Cir. Br. 37-38 (emphasis added). The UAW specifically advised the court that it was not pursuing "[t]he other material fact that would ordinarily be at issue in a case of this type," namely, "the question of whether there were alternative policies which the defendant could have adopted, other than the Fetal Protection Policy, which would have had a less disproportionate affect [*sic*] on the women workers." *Id.*, at 36-37 n.14.[20]

The Court of Appeals affirmed the District Court's judgment in a 7-4 *en banc* decision.[21] The majority concluded that Johnson Controls was entitled to summary judgment under *either* a business necessity *or* a BFOQ analysis and that the allocation of proof burdens was *irrelevant* given the record evidence in this particular case: if a business necessity analysis was used and the burden of persuasion placed on the UAW (pursuant to *Wards*

[19]The District Court also found that the UAW had failed to establish "an acceptable alternative that would have a lesser impact on females." JA 20. The UAW waived this issue on appeal. See *infra*, at 13, 45-48.

[20]Other than in the footnote quoted above, the UAW's brief nowhere discussed the question of possible alternatives to Johnson Controls' policy. The company noted in its appeal brief (at 33) that "the UAW does not even contest this point"; the UAW's reply brief was silent on the matter. As the Court of Appeals emphasized, "[t]he UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy." Pet. App. 40a.

[21]Two of the dissenting judges, while disagreeing that summary judgment had been appropriate on the specific record before the District Court, agreed with the majority that Title VII does *not* prohibit gender-drawn fetal protection measures as a matter of law. See Pet. App. 60a (Cudahy, J.); *id.*, at 69a (Posner, J.).

Cove Packing Co. v. *Atonio*, 109 S. Ct. 2115 (1989)), Johnson Controls was entitled to summary judgment;[22] if instead a BFOQ analysis was used and the burden of persuasion on all issues placed on Johnson Controls, Johnson Controls *still* was entitled to summary judgment. Pet. App. 42a, 48a-54a, 58a-59a.

With respect to the risk issues, the court found "clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure in the womb" at the maternal blood lead levels in question. Pet. App. 53a; see also *id.*, at 32a. In contrast, the evidence of male-mediated harms at these levels was, "at best, speculative and unconvincing"; Johnson Controls had established that lead poses toxic dangers "in particular, to the offspring of female employees." *Id.*, at 34a, 48a. Finally, although the company had documented its careful consideration of a number of less restrictive potential alternatives and why they were inadequate, the UAW "did not respond" to this evidence and had advised the court that the question of alternatives was not "at issue" in the case. UAW Seventh Cir. Br. 36-37 n.14. The Court of Appeals accordingly found that the UAW had waived the issue pursuant to Fed. R. App. P. 28(a)(4). Pet. App. 36a-38a. Johnson Controls' demonstration of the absence of feasible alternatives to its policy thus stood unrefuted.

The UAW has not sought review of the Court of Appeals' waiver holding. Nor has it sought review on the question whether the courts below properly applied the standards of Fed. R. Civ. P. 56 to the particular evidence of record. See Pet. Cert. Reply

[22]The Fourth and Eleventh Circuits had placed the burden of persuasion with respect to the "substantial risk" and "male mediation" issues upon the defendants in their modified business necessity analyses. See n.18, *supra*. So had the district court below. See *supra*, at 11-12. On appeal, Johnson Controls presented its case on the premise that it bore the burden of persuasion on these issues. After the briefs had been submitted to the Court of Appeals, this Court clarified that the burden of persuasion always remains on the plaintiff in a disparate impact/business necessity case. *Wards Cove*, 109 S. Ct., at 2126.

Br. 6-7 n.4 ("we do not argue . . . that if the court below is right on the law, the affirmance of summary judgment is wrong").

SUMMARY OF THE ARGUMENT

I. (a) The UAW's fundamental point—that Title VII categorically prohibits *all* fetal protection measures that distinguish among employees on the basis of their sex—has been rejected by the Equal Employment Opportunity Commission (EEOC) and every court of appeals that has considered the issue. Such measures in narrow instances can be "reasonably necessary to the normal operation" of an employer's business and thus permissible under Title VII. 42 U.S.C. § 2000e-2(e)(1). Contrary to the UAW, a manufacturer's "normal operation" is not limited to efficiency goals and product quality issues, but properly includes concern for the direct effects of its toxic hazards upon third-party health and safety. This common-sense reading of Title VII is reinforced by this Court's BFOQ precedents involving safety issues; by the consistently held views of the EEOC; by the views of other federal agencies (including OSHA, EPA, and CDC) that gender-drawn measures are occasionally necessary to protect fetal safety; by the legislative history of Title VII's BFOQ provision; by analogous precedents demonstrating that "external societal moral judgment" (UAW Br. 29 n.27) is not irrelevant in giving content to the BFOQ standard; and by an employer's legal duty (which cannot be parentally waived) to avoid injuries to the unborn resulting directly from the hazards of its own manufacturing operations. It would, in sum, be distinctly *abnormal* to conclude that Congress intended through Title VII to *require* an employer knowingly to expose unborn children to a toxic hazard shown to pose substantial risks of irreparable physical and mental harm. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1786 (1989) (plurality opinion) ("We need not leave our common-sense at the doorstep when we interpret a statute").

(b) Neither the Pregnancy Discrimination Act (PDA) nor the Occupational Safety and Health Act (OSH Act) alters these conclusions. The PDA amended the definition of "sex"

discrimination to include pregnancy-based and related classifications, but such classifications continue to be permissible where "reasonably necessary to the normal operation" of the particular business in issue. Moreover, OSHA's regulations set the floor, not the ceiling, for occupational health and safety.

(c) The three-part analysis followed by the courts of appeals strikes the appropriate "balance of rights" embodied in Title VII, *Price Waterhouse* v. *Hopkins*, *supra*, at 1788, and fully comports with this Court's BFOQ precedents. That analysis allows employers to adopt effective fetal protection measures while requiring that they do so with the least discriminatory impact possible. Although the BFOQ standard is appropriately an exacting one, employers should be given some latitude in structuring industrial safety practices "which, if they err at all, should err on the side of preservation of life and limb." *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (CA5 1976).

II. The judgment below should be affirmed. The Court of Appeals properly concluded that Johnson Controls was entitled to judgment under either a business necessity or a BFOQ analysis and irrespective of how proof burdens were allocated. Moreover, the UAW has not sought review on whether the standards of Fed. R. Civ. P. 56 were properly applied to the record evidence. In addition, having told the Court of Appeals that the question of adequate but less restrictive alternatives was not "at issue" in this case, and having thereby waived the issue (as the court below held), the UAW cannot now be heard to argue for a reversal on the ground that the issue received insufficient consideration.

ARGUMENT

I. TITLE VII ALLOWS AN EMPLOYER TO ADOPT A GENDER-DRAWN FETAL PROTECTION POLICY IN CERTAIN NARROW CIRCUMSTANCES

Every court of appeals considering the issue has concluded that, in narrow circumstances, medically validated fetal protection policies using gender classifications are lawful under Title

VII. The EEOC, the federal agency charged with primary enforcement of Title VII, has consistently shared this view. Moreover, the courts and the EEOC have considered the same underlying factors in assessing the validity of particular fetal protection policies. While taking different positions on whether these factors should be described as a business necessity or BFOQ analysis, they all have concluded that a challenged policy is proper where

> (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards;
>
> (b) the transmission of that harm to offspring is confined to employees of one sex; and
>
> (c) there are no adequate but less discriminatory alternatives to the employer's policy.[23]

The UAW argues, however, that gender-drawn fetal protection measures can *never* be lawful under Title VII because the safety of third parties is a "non-job-performance related concern[ ]" irrelevant to an individual's ability "to perform the assigned tasks" —here the manufacture of batteries "efficiently and proficiently." UAW Br. 30-31, 34. Title VII, the argument continues, only allows employers to consider "production-related" concerns and forbids them from accommodating "external societal moral judgment" about the way business should operate. *Id.*, at 29 n.27, 33.

[23]In addition to the Seventh Circuit's opinion below (Pet. App. 20a-28a), see *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548, 1552-1553 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190-1192 (CA4 1982); EEOC, *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) (hereinafter *EEOC 1988 Policy Guidance*), reprinted in Fair Emp. Prac. Manual (BNA) 405:6613; EEOC, *Policy Guidance on United Auto Workers* v. *Johnson Controls, Inc.* (Jan. 24, 1990) (hereinafter *EEOC 1990 Policy Guidance*), reprinted in Pet. App. 127a-144a. As the EEOC observed in its *1990 Policy Guidance*, the "pertinent questions" are the same "whether one applies the BFOQ or the 'business necessity' analysis." Pet. App. 138a-139a.

Implicit in the third factor is the requirement that the policy actually and effectively reduce the health risks to unborn children. "In other words, to avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available, with the least discriminatory impact possible." *Hayes, supra*, at 1553.

This argument is inconsistent with the statutory language, the legislative history, relevant precedents, and sound public policy. Protecting third parties—including fetuses—from substantial health and safety risks arising directly out of the manufacturing process is "reasonably necessary" to a responsible employer's "normal operation" and thus can constitute a BFOQ in narrow circumstances.[24]

A. Avoiding Substantial Risks Of Injury To Third Parties—Including Unborn Children—Is "Reasonably Necessary" To A Manufacturer's "Normal Operation"

1. *The Statutory Language.* The plain language of the BFOQ standard allows an employer to use gender-drawn distinctions where "*reasonably* necessary to the *normal* operation of [its] particular business or enterprise." Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (emphasis added). Contrary to the UAW's underlying premise, Congress's choice of the value-laden word "normal" necessarily requires a court to look to "external societal moral judgment" about how business should operate when giving

[24]Of course, before the BFOQ issue is reached, the Court must first conclude that Johnson Controls' policy constitutes disparate treatment. Our brief proceeds on the assumption that it does. However, as shown by the *amicus* brief of the Chamber of Commerce, a policy such as Johnson Controls' can be viewed as not automatically constituting disparate treatment; under the Pregnancy Discrimination Act, a plaintiff must first demonstrate that she has been treated differently from others whose employment in the job at issue would create a similar risk to unborn children.

In addition, we agree with every court of appeals considering the issue that fetal protection measures can be analyzed under a business necessity inquiry. See Pet. App. 20a-28a; *Hayes*, 726 F.2d, at 1548-1549, 1552-1553; *Olin*, 697 F.2d, at 1184-1186. If a policy differentiated among employees based on the degree of risk to the unborn that their employment in a particular job would cause, it would properly be viewed as being facially neutral. As the court in *Hayes* observed, where it is established that a substantial fetal risk is transmitted only through the exposure of one gender to a workplace hazard, a policy that responds to that risk is similarly neutral "in the sense that it equally protects the offspring of *all* employees," albeit with a disproportionate impact which must be justified. 726 F.2d, at 1552 (emphasis added). Fetal protection policies should be uniformly analyzed whether they

content to this standard. UAW Br. 29 n.27.[25] Chief among these "moral judgments" is the imperative of industrial safety. In this day and age, it cannot seriously be disputed that a company's desire to avoid direct harm to its employees and their families, its customers, and its neighbors from its own toxic hazards goes to the heart of its "normal operation." As the United States and the EEOC observe in their *amici* brief (at 16), "[a] broad variety of societal sanctions—ranging from statutes and regulations to tort liability, and from administrative fines to criminal penalties—reflect the importance of this concern." Judge Posner in his separate opinion below put an even sharper point on this proposition: the phrase "*normal* operation"

> should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal. . . .
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> • • • •
>
> ". . . In particular, the 'normal operation' of a business encompasses ethical, legal, and business concerns about the

refer expressly to gender or instead to "neutral" criteria that in turn implicate gender. See *Olin, supra,* at 1186. As the Court of Appeals noted below, this Court has emphasized the need to avoid inflexible application of Title VII proof patterns to particular factual situations. Pet. App. 20a-21a (citing, *e.g., Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 575-576 (1978); *Teamsters* v. *United States,* 431 U.S. 324, 358 (1977). This Court also has observed that both a business necessity and a BFOQ analysis "may, of course, be applied to a particular set of facts." *Teamsters, supra,* at 336 n.15.

[25]"Normal" means "according to, constituting, or not deviating from an established norm, rule, or principle: conformed to a type, standard, or regular pattern." *Webster's Third New International Dictionary* 1540 (1981); see also *Black's Law Dictionary* 955 (5th ed. 1979) ("performing the proper functions"); *The Random House Dictionary of the English Language* 1321 (2d ed. 1987) ("normal" means, *e.g.,* "free from any infection or other form of disease or malformation").

> effects of an employer's activities on third parties. An employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees." Pet. App. 64a-66a.

See also *id.,* at 69a (Posner, J.) (equating "normal" with "civilized, humane, prudent, ethical"); *id.,* at 60a n.1 (Cudahy, J.); U.S. and EEOC *Amici* Br. 17 ("A concern with direct harm to third parties from the manufacturing process fits comfortably within the scope of an element 'reasonably necessary to the normal operation of [a] particular business or enterprise' ").[26]

2. *Safety Cases.* This Court's precedents underscore that an employer's reasonable concern for the direct effects of its operations upon the safety of others can constitute a BFOQ. In *Dothard* v. *Rawlinson,* for example, the Court explained that, "[i]n the *usual* case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." 433 U.S. 321, 335 (1977) (emphasis added). Where "[m]ore is at stake" than the individual's own well-being, however, safety risks can become a compelling consideration supporting gender-drawn classifications. *Id.,* at 335-336 (permissible to exclude women guards from a "male, maximum-security, unclassified penitentiary" where their presence would pose "a real threat" to themselves, other security personnel, and inmates).

[26]The UAW also argues that third-party safety concerns cannot support a BFOQ because they "apply to a broad range of businesses," whereas the statute requires a court to look only to the normal operation of the "particular business" in question. UAW Br. 42-43. This reasoning is untenable. Valid "normal operation" concerns cannot be transformed into illegal discrimination simply because they pertain to many businesses. The inquiry instead is whether the presence of the specific hazard is reasonably necessary in the particular business in question. As the Court of Appeals emphasized below, lead exposure is presently an unavoidable consequence in the "particular business" of a battery manufacturer. Pet. App. 9a; see also *id.,* at 59a n.43 ("if ever a lead-free battery were developed, the problems in this case would fall by the wayside"). Such exposure is not reasonably necessary in the operations of most other businesses, just as exposure to most hazards other than lead is not reasonably necessary to Johnson Controls' particular business.

Similarly, the Court emphasized in *Western Air Lines, Inc.* v. *Criswell* that, "[i]n adopting [the BFOQ] standard, Congress did not ignore the public interest in safety." 472 U.S. 400, 419 (1985). In that case arising under the Age Discrimination in Employment Act, the Court stressed that the BFOQ inquiry must " 'adjust[ ] to the safety factor' " where " 'reasonably necessary' to further the overriding interest in public safety." *Id.*, at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (CA5 1976)). Cf. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979) (business necessity defense).

The UAW argues that *Dothard* and *Criswell* are inapposite because the "safety concerns" in those cases "were not *independent* of the individual's abilities to perform the assigned tasks"—in *Dothard* the maintenance of prison security, in *Criswell* the safe transport of airline passengers—whereas here, the third-party safety risk is "independent" of an employee's ability to produce batteries "efficiently and proficiently." UAW Br. 30-31 (emphasis added); see also Pet. App. 85a (Easterbrook, J., dissenting) (distinguishing *Criswell* on the ground that "Johnson is not using sex to avert harm to customers"). These purported distinctions find no warrant in Title VII and merely beg the question of what responsibilities are encompassed in a company's "normal operation." Our society has made the judgment that it is distinctly *abnormal* for manufacturers to be concerned only with the "efficient" and "proficient" operation of their own enterprises, and has imposed duties to avoid harm from their products and operations that extend far beyond their own employees or customers.[27] The language of the BFOQ provision shows that, far from restricting these broad duties recognized by society, Congress intended to accommodate them.

Under *Dothard* and *Criswell*, the appropriate inquiry is whether an employer's justification is of only "peripheral" significance or instead bears on the "central mission" and the "es-

[27]See generally *Prosser and Keeton on the Law of Torts* §§ 30-31, 53-57, 60-61, 63-64, 69-81, 87-88, 96, 98-101 (5th ed. 1984); Restatement (Second) of Torts §§ 1, 4 (1965).

sence" of its "normal operation." *Dothard*, 433 U.S., at 333-337; *Criswell*, 472 U.S., at 413, 416 n.24.[28] Given "the overriding interest in public safety," *id.*, at 413, a company's concern for the direct effects of its manufacturing operations upon the health and safety of others can *never* be characterized as a "peripheral" concern, but instead must be viewed as "central" to its normal operation. See Pet. App. 48a-49a.

3. *Agency Views.* The views of the EEOC and other federal agencies bolster the conclusion that gender-drawn employment practices designed to protect the health and safety of unborn children are occasionally "reasonably necessary to the normal operation" of business.

(a) The EEOC has always held the view that Title VII does not *per se* invalidate gender-based fetal protection policies.[29] Although its views on the appropriate analytical methodology have evolved from a business-necessity to a BFOQ framework, the EEOC has emphasized that the "pertinent questions" are the same "whether one applies the BFOQ or the 'business necessity' analysis." *EEOC 1990 Policy Guidance*, *supra* n.23, Pet. App. 138a-139a. On the underlying issue, the agency has consistently

[28]The "essence" language derives from *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA5), cert. denied, 404 U.S. 950 (1971), a case that illustrates the error of the UAW's BFOQ analysis. The airline argued there that its "normal operation" included accommodating the desires of some male passengers to have only female cabin attendants. Because these passenger desires (which themselves rested upon stereotyped notions) were "tangential to the essence of the business involved" —the safe transport of passengers—they could not support a BFOQ defense. *Id.*, at 388. On the other hand, an employer may establish a BFOQ where the presence of the restricted class would "jeopardize or even minimize its ability" to operate in a safe manner. *Ibid.* That is precisely the case here.

[29]The agency first took this view in proposed guidelines issued in 1980, 45 Fed. Reg. 7514, which were withdrawn in favor of case-by-case investigation and analysis, 46 Fed. Reg. 3916 (1981). See also EEOC Compliance Manual § 624 (inquiry is whether employer's "exclusionary practice is necessary to the safe and efficient operation of its business"); *EEOC 1988 Policy Guidance*, reprinted in Fair Empl. Prac. Manual

rejected one-sided approaches like the UAW's and instead construed Title VII as preventing "unnecessary limitations on women's employment opportunities, *while preserving the employers' (and society's) legitimate interest in protecting the health of offspring.*" *EEOC 1988 Policy Guidance*, *supra* n.23, reprinted in Fair Empl. Prac. Manual (BNA) 405:6613 (emphasis added); see also *EEOC 1990 Policy Guidance*, Pet. App. 136a. This reasonable interpretation of Title VII is entitled to deference.[30]

(b) Other federal agencies also have endorsed the use of gender where necessary to protect the unborn. For example, OSHA's lead standard emphasizes that company physicians must have "broad flexibility" in evaluating and managing pregnancy-related risks associated with lead exposure—including the use of gender-based protective and removal measures where necessary to protect fetal health. 29 CFR § 1910.1025 App. C, p. 182 (1989).[31] Similarly, beginning in the late 1970s, the Environmental Protection Agency categorically prohibited employers from allowing women of childbearing age to serve as applicators of the fetotoxic pesticide Ferriamicide. Although expressing concern about gender-based classifications, EPA concluded that "[i]n some cases, however, such distinctions are justifiable. . . . [T]he trade-off here was essential" in order to prevent "abnormal children."[32] And as discussed above, the Centers for Disease Control (HHS) have concluded that "[t]he prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs." JA 184; see also *supra*, at 4.

These views of other agencies do not, of course, control the interpretation of Title VII; that is a task for the courts and the EEOC. They nevertheless are significant. *First*, they demonstrate that fetal protection is not simply part of this one employer's "own moral and ethical agenda" (UAW Br. 34), but is a critical public health concern. *Second*, the considered views of these

(BNA) 405:6616 ("Where substantial evidence exists that the risk of harm to employees' offspring takes place only through the exposure of one sex to a hazard existing in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards"); *EEOC 1990 Policy Guidance*, Pet. App. 136a ("the Commission concurs with Judge Cudahy's observation that the employer 'may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making' ") (quoting Pet. App. 60a n.1); U.S. and EEOC *Amici* Br. 16-20.

[30]See *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) (deference to EEOC's reasonable construction is "axiomatic"); see also *Local No. 93, International Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 518 (1986) (though lacking "the force of law," EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (internal quotations omitted); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (even where not embodied in formal rules, EEOC views entitled to great deference). Even where an EEOC guideline represents a change in the agency's position, it still is "no doubt entitled to great deference" in the absence of " 'compelling indications that it is wrong.' " *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973) (citation omitted); cf. *Mobil Oil Corp.* v. *EPA*, 276 U.S. App. D.C. 352, 355, 871 F.2d 149, 152 (1989) (per curiam) (*Chevron* deference standard applies to agency reinterpretations of statutes). Here, of course, there has been no change at all in the agency's views on the underlying question.

[31]Although OSHA in promulgating its lead standard declined to endorse the broad proposition "that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy," 43 Fed. Reg. 52,966 (1978), it did *not*, contrary to the impression conveyed by the UAW, reject the use of gender-specific fetal protective measures. Thus the lead standard specifically recognizes the propriety of "special protective measures or medical removal for an employee who is pregnant or who is planning to conceive a child when, in the [company] physician's judgment, continued exposure to lead at the current job would pose a significant risk" to fetal health, 29 CFR § 1910.1025 App. C, p. 182—measures that would be invalidated under the UAW's absolutist approach. See also 43 Fed. Reg. 52,974 (removal of female employee may be necessary "so that prior lead exposure will not harm the fetus"; also rejecting proposal that employee consent be a precondition to medical removal); *supra*, at 4-5 & n.6.

[32]See [1979] O.S.H. Rep. (BNA) 1481-1482 (quoting letter of EPA Deputy Administrator Barbara Blum); see also 43 Fed. Reg. 47,774 (1978); 44 Fed. Reg. 11,111, 11,112, 11,116-11,117 (1979); 47 Fed. Reg. 46,885 (1982) ("Women of child-bearing age are prohibited from loading/applying Ferriamicide").

agencies reinforce the conclusion that gender-drawn fetal protective measures are, in certain narrow circumstances, "reasonably necessary" to the normal, safe, and ethical operation of business.

4. *Legislative History of the BFOQ Provision and Relevant Non-Safety Precedents.* The legislative history of § 703(e), together with cases construing the BFOQ defense in contexts other than third-party safety, further undermine the UAW's absolutist position.

As one analysis of the legislative record has concluded:

> "That sex was . . . to be subject to a bfoq exception seems to have been more intuitively felt than explained by the Act's draftsmen. The sponsor of the addition of sex to the clause, Representative Goodell, merely posed the example of an elderly woman in a nursing home who desires a female nurse. Other congressional examples of cases in which sex was a bfoq were an all-male baseball team and a masseur. The Act thus evidences a judgment that *certain functional differences, both physically and culturally defined,* exist between the sexes, and that employers can legitimately accommodate such differences in their hiring patterns." Developments, *Employment Discrimination And Title VII of The Civil Rights Act of 1964,* 84 Harv. L. Rev. 1111, 1176 (1971) (emphasis added).[33]

[33]See also 110 Cong. Rec. 2718 (1964) (remarks of Rep. Goodell in proposing addition of "sex" as a BFOQ) ("There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception"); *id.*, at 7213 (interpretative memorandum submitted by Sens. Clark and Case) ("This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion").

Consistent with Congress's intent, this Court has emphasized that Title VII permits employment classifications grounded on "*actual physical*" differences between the sexes, as opposed to "archaic or stereotypical notions." *California Federal Savings & Loan Ass'n* v. *Guerra,* 479 U.S. 272, 290 (1987) (emphasis in original) (upholding differential pregnancy-disability benefits); see also *Dothard* v. *Rawlinson,* 433 U.S., at 334-337. Cf. *Michael M.* v. *Superior Court of Sonoma County,* 450 U.S. 464, 481 (1981) (Stewart, J., concurring) (equal protection standards do not require one "to pretend that demonstrable differences between men and women do not really exist"). As the Court of Appeals explained below, Johnson Controls' fetal protection policy is consistent with these principles because it rests upon medically established "real physical differences" between the sexes, Pet. App. 46a—at the blood lead levels involved here, the substantial risks of permanent brain damage to a child flow directly from its exposure *in utero* to the mother's blood, not from damage transmitted through deformed sperm.

Cases involving patient and customer privacy rights also are significant to the present analysis. Courts have consistently recognized that sex can be a BFOQ in occupations "which require an employee to work with or around individuals whose bodies are exposed in varying degrees." *Norwood* v. *Dale Maintenance System, Inc.,* 590 F. Supp. 1410, 1416 (ND Ill. 1984) (*re* day-shift washroom attendants); see also *Fesel v. Masonic Home of Delaware, Inc.,* 447 F. Supp. 1346, 1350-1354 (Del. 1978) (intimate personal care of elderly women in nursing home), affirmance order, 591 F.2d 1334 (CA3 1979). These cases rest largely upon the recognition that, where an individual is required to reveal intimate bodily areas and functions, "personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business." *Fesel, supra,* at 1352.[34]

[34]" '[A]n accretion of decisional law recognizes that privacy, in both its tort and constitutional manifestations, encompasses the individual's regard for his own dignity; his resistance to humiliation and embarrassment; his privilege against unwarranted exposure of his nude body and

This consensus underscores that the UAW's narrowly defined "ability-to-perform-the-assigned-tasks" standard is not the *sine qua non* of a BFOQ and that "external societal moral judgment" is not irrelevant in giving content to an employer's obligations under Title VII.[35] And if it can be a BFOQ to respect third-party sensitivities for bodily privacy, so much more the case where third-party physical and mental health are at stake. Finally, the BFOQ-privacy cases confirm that Title VII was intended to accommodate legally implicated interests that are directly affected by an employer's activities; that is the essence of "*normal* operation." So it is with this employer.

bodily functions.'" *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191, 1195 (ED Ark. 1981) (*re* sex as a BFOQ in obstetrics and gynecology nursing care) (citation omitted), vacated as moot, 671 F.2d 1100 (CA8 1982). See also *Moteles* v. *University of Pennsylvania*, 730 F.2d 913, 919-921 (CA3) (assistance of rape victims), cert. denied, 469 U.S. 855 (1984); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1086-1087 (CA8) (prisoner strip searches and surveillance of prisoners' showers and toilets), cert. denied, 446 U.S. 966 (1980); *Jones* v. *Hinds General Hospital*, 666 F. Supp. 933 (SD Miss. 1987) (intimate contact with hospital patients); *Brooks* v. *ACF Industries, Inc.*, 537 F. Supp. 1122 (SD W.Va. 1982) (cleaning of bathhouses); EEOC Dec. No. 76-130 (CCH) ¶ 6692 (Aug. 10, 1976) (counseling mentally handicapped women about intimate matters).

In addition to the privacy cases, see, *e.g.*, *Chambers* v. *Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (girls' club established BFOQ defense with respect to "role model rule" forbidding unwed pregnant women from serving as staffers); *Pime* v. *Loyola University of Chicago*, 803 F.2d 351, 353-354 (CA7 1986) (maintenance of Jesuit presence in philosophy department of Catholic university a BFOQ).

[35]The UAW contends that it is "controversial whether these cases were correctly decided." UAW Br. 31 n.29. The only support offered for this proposition is *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA5), cert. denied, 404 U.S. 950 (1971). As noted *supra*, at 21 n.28, *Diaz* held that customer preference for female airline attendants is not a BFOQ. This has nothing to do with the cases discussed. "[G]iving respect to deep-seated feelings of personal privacy involving one's own genital areas is quite a different matter from catering to the desire of some male airline passengers to have . . . an attractive stewardess." 1 A. Larson, *Employment Discrimination—Sex* § 14.30, at 4-10 (1990).

5. *Legal Duty.* Johnson Controls' concern for fetal safety does not simply reflect its "own moral and ethical agenda" or a quaint regard for the welfare of future generations. UAW Br. 34. The company has a legal duty to avoid injuries to the unborn that result directly from the toxic hazards of its own manufacturing operations. "The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries . . . ." *Prosser and Keeton on the Law of Torts* § 55, at 368 (5th ed. 1984) (citations omitted); see also Restatement (Second) of Torts § 869 and comment *b* (1979) ("The tortious conduct may be intended to cause harm to the child or the mother, or it may be negligent with respect to either; or it may lie in the field of abnormally dangerous activities, for which strict liability will be imposed").

Moreover, the pronounced trend of authority is to recognize such a duty, enforceable in both negligence and strict liability, to children who *have not yet even been conceived*.[36] And contrary to the UAW's assertion that an employer might discharge this duty simply by cautioning its employees about the risks and leaving the choice entirely to them, UAW Br. 34-36 n.31, the employer's duty runs *directly* to the fetus (or potential fetus); a parent (or

[36]See, *e.g.*, *Bergstreser* v. *Mitchell*, 577 F.2d 22, 26 (CA8 1978) (applying Missouri law in negligence action); *Jorgensen* v. *Meade Johnson Laboratories, Inc.*, 483 F.2d 237, 240 (CA10 1973) (applying Oklahoma law in strict products liability action); *Turpin* v. *Sortini*, 31 Cal. 3d 220, 230-231, 182 Cal. Rptr. 337, 343, 643 P.2d 954, 960 (1982) (en banc) (noting in child's "wrongful life" action the preconception tort rule in negligence cases); *Empire Casualty Co.* v. *St. Paul Fire & Marine Insurance Co.*, 764 P.2d 1191, 1196-1197 (Colo. 1988) (en banc) (preconception negligence established basis for insurance liability); *McAuley* v. *Wills*, 251 Ga. 3, 6, 303 S.E.2d 258, 260 (1983) (negligence action); *Renslow* v. *Mennonite Hospital*, 67 Ill. 2d 348, 359, 367 N.E.2d 1250, 1255-1256 (1977) (same); *Pitre* v. *Opelousas General Hospital*, 530 So. 2d 1151, 1157-1158 (La. 1988) (same); *Monusko* v. *Postle*, 175 Mich. App. 269, 276, 437 N.W.2d 367, 369-370 (1989) (same); *Enright* v. *Eli Lilly & Co.*, 155 App. Div. 2d 64, 70, 553 N.Y.S.2d 494, 497 (1990) (adopting rule in strict products liability action involving special DES statutes of limitations relating to certain toxic substances).

potential parent) can neither waive that duty nor assume the risk on behalf of the child. As Judge Posner emphasized below,

> "[t]he mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. It would merely make the mother a joint tortfeasor with the employer." Pet. App. 66a (citations omitted).[37]

An employer's efforts to honor reasonably perceived legal duties cannot justly be equated with a simple concern for the monetary bottom line—though lower courts have questioned the fairness of forcing an employer knowingly to expose a fetus to its hazardous substances and processes and then requiring it to

[37]See also *Prosser and Keeton* § 74, at 531-532; Restatement (Second) of Torts § 488(1) (1965). Even commentators who otherwise are critical of fetal protection policies have recognized that an employer's legal duties to the unborn cannot be parentally waived. See Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L. J. 641, 646 (1981) ("the woman worker could not waive her offspring's right to sue the employer because a parent's bargain to waive a cause of action belonging to his or her child breaches a trust owed to the child and thus renders the contract illegal and unenforceable") (citations omitted); Becker, *From* Muller *v.* Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1244 n.112 (1986) (parent cannot waive unborn child's negligence-based claims) (citations omitted). The majority view is that an employer also owes a *respondeat superior* duty to a child injured through its parent's negligence while the parent was acting in the employer's service. See Annot., 1 A.L.R. 3d 677 § 9 (1965 & Supp. 1989) (collecting cases).

Citing products liability duty-to-warn cases, the UAW argues that a warning might be sufficient to avoid the imposition of strict liability. UAW Br. 34-36 n.31. This is incorrect. In the products liability context, a warning is sufficient only if the product is otherwise "safe for use if [the warning] is followed." Restatement (Second) of Torts § 402A comment *j*. Liability for injuries arising from "abnormally dangerous activities" is avoided through warnings only to the extent that an injured person knows of the risk and voluntarily chooses to take part in the hazardous activity. *Id.* §§ 519-520, 523-524 (1977). As noted above, the law does not absolve an employer's duty toward the unborn child simply because the parent may have knowingly assumed the risk.

compensate for the resulting devastation.[38] This Court observed in *Los Angeles Department of Water & Power* v. *Manhart* that Title VII contains no "cost justification defense" permitting differential treatment between the sexes. 435 U.S. 702, 716-717 (1978). But the question in *Manhart*—how to structure pension contributions and payments—involved no externally imposed legal responsibilities to be balanced against Title VII's principle of equal treatment.

Much more is at stake here. Whether the interest is characterized as fulfilling reasonably perceived legal duties or simply as promoting the overriding societal interest in the health and safety of children, properly crafted fetal protection measures serve a distinctly "higher public policy than simply protecting employers from lawsuits." *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1553 n.15 (CA11 1984). See also U.S. and EEOC *Amici* Br. 16-17 n.13.[39]

The UAW's reasoning ultimately reduces to the proposition that, *if* this Court were to invalidate all gender-drawn fetal protection measures as a matter of law, such a ruling necessarily would invalidate any legal duty that otherwise might impose liability for the failure to use such measures. UAW Br. 34-36 n.31. Although we agree that such a ruling should have preemptive

[38]See Pet. App. 23a-24a n.25; *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986, 992 n.10 (CA5 1982); see also Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 87 (1980) ("It is not seemly that society condone or encourage the malformation of the fetus as a result of exposure to a toxic work environment by first enacting laws that forbid taking the fetus' susceptibility into account and then 'compensating' for the ensuing damage by requiring employers to assume the risk of such births and to insure against it").

[39]*Manhart*, which the UAW relies upon heavily throughout its brief, is distinguishable in another important respect: it dealt with the threshold question of what constitutes "discrimination" within the meaning of Title VII, not with the distinct question of when such "discrimination" is permissible under the BFOQ standard. Specifically, *Manhart* held that an employment practice turning on "unquestionably true" generalizations about "class characteristics," as opposed to "individual characteristics," is "discrimination" under Title VII. 435

effect on inconsistent legal obligations,[40] the UAW's argument fundamentally misperceives the nature of the BFOQ standard. Under the UAW's reasoning, the courts in *Criswell* and *Tamiami* could have held that the responsibility to provide safe passenger transportation was overridden by the ADEA, so that employers could never take age into account; the alarm over increased safety hazards could have been dismissed as a simple "cost justification" concern forbidden by *Manhart*. Likewise, courts could have construed Title VII as annulling otherwise legally protected interests in the personal privacy and dignity of patients and customers; a norm of absolute employment equality would always trump competing rights.

No court ever has viewed Title VII in such a manner. Rather than intending to invalidate legal obligations reflecting "external societal moral judgment" of the way business should be conducted, UAW Br. 29 n.27, Congress chose to *recognize* and *preserve* these obligations by permitting accommodations of Title VII's requirements where "reasonably necessary to the normal operation" of an employer's business. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1786, 1788 (1989) (plurality opinion) (emphasis added) (Title VII reflects a "*balance* of rights," and "the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute"). Because Johnson Controls has a reasonably perceived legal duty to protect the health and safety of unborn children, and in any event because of the overriding importance of industrial safety, appropriately drawn

U.S., at 708. The BFOQ defense, which was not advanced by the petitioner in *Manhart*, see *id.*, at 716 n.30, is implicated only once "discrimination" has been established. This Court has emphasized that, in narrow circumstances, "class characteristics" *can* support a BFOQ—for example, where it is impossible or highly impractical to differentiate other than on the basis of membership in the class. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 411, 415-416. Johnson Controls documented why less restrictive alternatives were impractical in this case, and the UAW did not contest the point before the Court of Appeals—indeed, it expressly waived the issue. See *supra*, at 12-13; *infra*, at 45-48.

[40] See *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-281 (1987); 42 U.S.C. § 2000e-7.

measures in furtherance of these goals are part of its "normal operation" and support a BFOQ defense.

B. The Pregnancy Discrimination Act Did Not Narrow The Scope Of The BFOQ Standard

The UAW contends that, even if third-party safety concerns can constitute a BFOQ in contexts other than pregnancy and childbearing capacity, the Pregnancy Discrimination Act fundamentally altered the scope of the BFOQ in this one area. This argument misconstrues the language, legislative history, and purposes of the PDA.

1. *The PDA's Language.* The UAW focuses on language in the PDA's second clause providing that "women affected by pregnancy, childbirth, or related medical conditions" shall be treated the same as others "not so affected but similar in their ability or inability to work." Title VII § 701(k), 42 U.S.C. § 2000e(k). It contends that the statutory reference to "ability" forbids an employer from taking into account anything but narrowly defined "performance-related considerations" when structuring its industrial safety practices, even where this would prohibit practices "reasonably necessary" to the employer's "normal operation." UAW Br. 31.

One flaw in this analysis is that it incorrectly assumes that one's job "ability" turns simply upon efficient product production, as opposed to *safe* and efficient product production. More fundamentally, as this Court has repeatedly emphasized, the "ability" language is part of a broader provision that redefined "sex" to include "pregnancy, childbirth, or related medical conditions," thus subjecting these conditions to normal Title VII analysis *without substantively altering the terms of that analysis*.[41]

[41] See *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S., at 288-289 ("Rather than limiting existing Title VII principles and objectives, the PDA extends them to cover pregnancy"); *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1084 n.14 (1983) ("the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles"); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 n.14 (1983) ("The meaning of the first clause [redefining "sex" discrimination subject to Title VII scrutiny] is not limited by the specific ["ability"] language in the second clause, which explains the application of the general principle to women employees").

Accordingly, Title VII as amended by the PDA continues to permit classifications based on "*actual physical*" differences associated with childbearing, as opposed to "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S., at 288-289 (emphasis in original). Where such actual physical differences impact on a company's "normal operation" by threatening industrial health and safety, they continue to support a BFOQ defense. See also U.S. and EEOC *Amici* Br. 20 n.18 (PDA does not create "special exemption" for pregnancy from BFOQ standard).[42]

2. *The PDA's Legislative History.* The voluminous legislative history "is virtually void of any testimony or debate on the problem of exposing pregnant women to toxic work environments," containing only "fleeting reference to fetal problems." Furnish, *supra* n.38, 66 Iowa L. Rev., at 77-78. Yet the UAW and its supporting *amici* would have this Court believe that Congress specifically pondered the issue and concluded to outlaw all employer measures to protect fetal health that in any way implicate gender.[43]

Their argument hinges in particular on a statement contained in prepared remarks submitted on behalf of the United States Chamber of Commerce to Senate and House subcommittees considering the legislation, in which a Chamber representative suggested that, among many other perceived problems, the PDA could be read to "prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat

[42]The PDA also contains a clause providing that the Act is not to be construed to "require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . ." 42 U.S.C. § 2000e(k). It would be anomalous to interpret a statute that allows an employer to decline to contribute toward the abortion of a fetus as simultaneously *requiring* the employer to expose the fetus to toxic hazards known to cause substantial risks of irreversible brain damage

[43]See, *e.g.*, UAW Br. 38-40 & n.33; Br. *Amici Curiae* of Equal Rights Advocates, *et al.*, at 1-13.

to the health of either the mother-to-be or her unborn child."[44] It is untenable to assert that Congress's failure to "indicate any disagreement" with this remark, which was never repeated in committee reports or legislative debates, demonstrates that Congress thereby approved of this interpretation.[45] "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); see also *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976) ("Remarks of this kind . . . other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach' ") (citation omitted).[46]

[44]Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 482 (1977) [hereinafter Senate Subcommittee Hearings] (statement of C. Brockwell Heylin, labor relations attorney, Chamber of Commerce). Mr. Heylin submitted a virtually identical statement to the House subcommittee considering the legislation. Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, Part 1, 95th Cong., 1st Sess. 84, 88 (1977).

[45]See Br. *Amici Curiae* of Equal Rights Advocates, *et al.*, at 11; UAW Br. 38-39 n.33. The Equal Rights Advocates' brief goes so far as to hypothesize (at 5, 10) that Senator Hatch, "the leading (though unsuccessful) proponent" of narrowing amendments to the PDA, "chose not even to suggest amending the PDA" in response to Mr. Heylin's remark, which, we are told, shows that he "may" have been persuaded that gender-drawn fetal protective measures should be *per se* unlawful.

It also bears note that the Chamber's Senate subcommittee testimony simply addressed workplace exposure that "arguably posed a threat" to the fetus. A gender-based job transfer in those circumstances clearly would not pass muster under the Seventh Circuit's analysis. See Pet. App. 59a n.43.

[46]The UAW also points to a colloquy between Senator Hatch and Dr. Andre Hellegers during the Senate subcommittee hearings. UAW Br. 38-39 n.33. In response to the Senator's question about whether the

What the UAW and its supporting *amici* ignore are the repeated expressions by proponents of the PDA that the bill would simply amend the definition of "sex" to include pregnancy, without altering in any way the substance of Title VII or the specific contours of the BFOQ "normal operation" standard.[47] Even more fundamentally, they fail to offer any plausible explanation of why Congress possibly might have intended a measure designed in part to *protect* fetal health to be construed as *requiring* an employer *knowingly* to expose the unborn to toxic hazards demonstrated to cause irreparable brain damage. As this Court has counseled, "[w]e need not leave our common-sense at the

PDA "would raise a whole slew of OSHA problems . . . as a result of pregnant women," Dr. Hellegers stated that, "if we are talking about untoward effects [of] the industrial process on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that." Senate Subcommittee Hearings, *supra* n.44, at 67.

This discussion hardly suggests that the PDA would prohibit all gender-drawn fetal protective measures, as opposed to requiring that such measures be justified by scientific evidence of actual differences between male- and female-mediated effects on the fetus. That, of course, is precisely what the Seventh Circuit and other courts of appeals have required.

[47]"This bill will make pregnancy-based discrimination subject to the *same scrutiny* on the *same terms* as other acts of sex discrimination, and of course, *provides the employer with the same defense, if proven, that the act recognizes for other forms of sex discrimination* . . . . [P]assage of the bill imposes *no new, unfamiliar or untried legal burdens upon employers or legal principles upon the courts*." Senate Subcommittee Hearings, *supra* n.44, at 117 (testimony of Prof. Wendy Williams) (emphasis added). See also H.R. Rep. No. 95-948, p. 4 (1978) ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute"); S. Rep. No. 95-331, pp. 5-6 (1977) (PDA "does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S., at 679 n.17 (citing extensive legislative remarks that PDA was simply definitional legislation subjecting pregnancy to already-established Title VII principles and would "not really add anything to title VII") (quoting Rep. Hawkins).

doorstep when we interpret a statute." *Price Waterhouse* v. *Hopkins*, 109 S. Ct., at 1786.[48]

C. The OSH Act Does Not Displace The BFOQ Standard

The UAW also argues that Title VII should be construed to prohibit all gender-based fetal protection policies because they implicate "complex social decisions" in areas in which federal judges have "no particular scientific expertise"; the question should instead be relegated to OSHA. UAW Br. 40-42. This reasoning is flawed in at least two critical respects.

First. OSHA standards do not set a *maximum* allowable limit for occupational health and safety. OSHA's lead standard itself

[48]The UAW points to testimony describing the severe effects that a loss of income and benefits could have upon both a pregnant woman and her unborn child, reasoning that, thus apprised of this problem, Congress thereby intended categorically to bar gender-drawn fetal protective measures and to prohibit an employer from having any say in the fetal-safety risks created by its *own* toxic manufacturing operations. UAW Br. 39-40. However, similar economic and health concerns for the groups favored by the ADEA and Title VII as originally enacted were offered at the time as reasons why those measures should be adopted. See, *e.g.*, *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 229 (discussing legislative history of ADEA detailing " 'the cruel sacrifice in happiness and well-being, which joblessness imposes on these citizens and their families' ") (citation omitted); H.R. Rep. No. 1370, 87th Cong., 1st Sess. 1, 1-5 (1962) (*re* predecessor proposal of Title VII) (detailing individual and societal costs of employment discrimination). Such supporting considerations have never been understood to render classifications that are suspect under these laws *per se* illegal (except those drawn on racial lines), but rather to subject them to careful scrutiny under the BFOQ standard. The legislative history of the PDA does not indicate that Congress intended otherwise with respect to pregnancy.

Under Johnson Controls' policy, of course, employees who are transferred from high-risk positions receive full medical removal protection benefits indefinitely to ensure they suffer no reduction in wages and benefits. See *supra*, at 9-10 & n.14. Although applicants who are not permitted into high-risk positions do not receive MRP benefits, it would be odd if Congress had intended, in order to promote fetal health and to compensate for a general societal failure to provide proper prenatal care, to *require* employers to injure the unborn.

provides that physician-recommended safety practices—including those addressed to fetal health and safety—"may be more stringent than the specific provisions of the standard." 29 CFR § 1910.1025 App. C, p. 182 (1989).[49] Moreover, under the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), an employer who knows that particular OSHA standards are inadequate to protect against the workplace hazards they were intended to address is obligated to go "over and above" those specific standards on its own initiative as necessary to protect health and safety. *UAW* v. *General Dynamics Land Systems Division*, 259 U.S. App. D.C. 369, 376, 815 F.2d 1570, 1577, cert. denied, 484 U.S. 976 (1987); see also *Emhart Industries, Inc.* v. *Duracell International, Inc.*, 665 F. Supp. 549, 570 n.40 (MD Tenn. 1987). Nor do OSHA standards supersede state common law and statutory obligations of employers to avoid "injuries, diseases, or death . . . arising out of" their operations. 29 U.S.C. § 653(b)(4). As the United States and the EEOC note in their *amici* brief (at 24 n.21), "OSHA's 1978 conclusions [are] not dispositive of the issues in this case."

Second, where an employer moves beyond a regulatory standard that it believes is based on outdated information and is inadequate to protect industrial safety, and does so in a way that implicates Title VII's values, an affected employee may challenge the employer in court. It makes no sense to argue that, simply because the employee has a cause of action involving complex scientific issues and the private litigation system may "yield disparate results," the challenged safety measure should *ipso facto* be invalidated. UAW Br. 42. As the Second Circuit has observed in an ADEA case, though "[i]t seems somewhat anomalous for the lawfulness of [safety measures] to depend on the particular evidence presented at various court trials throughout the country," that is the necessary consequence of the scheme Congress

[49]As shown above, it is ironic that the UAW relies so heavily upon OSHA's lead standard given that the standard specifically recognizes the propriety of gender-based protective and removal measures where necessary to guard fetal health—measures that the UAW's approach would render *per se* illegal. See *supra*, at 4-5, 22-23 & n.31.

has chosen, which obligates courts "to undertake [an] extensive inquiry" on a case-by-case basis into the safety risks involved and the feasible alternatives to employer practices. *Hahn* v. *Buffalo*, 770 F.2d 12, 15-16 (1985); see also *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 411-412 ("diverse employment situations" require case-by-case analysis under BFOQ standard); *Johnson* v. *Mayor and City Council of Baltimore*, 472 U.S. 353, 361-362 (1985). Indeed, the complexity of the issues suggests, *not* a rule that the employee always prevails, but a standard according "substantial discretion" to employers who are striving to protect the health and safety of others. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 238.

D. A Fetal Protection Policy That Satisfies The Three-Part Inquiry Developed By The Lower Courts Is Lawful Under The BFOQ Standard

We believe the three-part analysis followed by the courts of appeals and set forth above on page 16 fully comports with the BFOQ standard outlined by this Court in *Criswell*. See also *EEOC 1990 Policy Guidance*, *supra* n.23, Pet. App. 138a-139a (the "pertinent questions" are the same "whether one applies the BFOQ or 'business necessity' analysis"). In particular, an employer cannot establish the absence of adequate but less discriminatory alternatives unless it can show that membership in the restricted class is a "legitimate proxy" for protecting against the fetal safety risks in question. *Criswell*, *supra*, at 414. This can be established by demonstrating *either* that (1) "all or substantially all" of the excluded group are likely to risk the health of offspring if they continue working in high-risk toxic areas, *or* that, as here, (2) it is "impossible or highly impractical" to assess the safety risks on an individualized basis, *i.e.* to determine " 'with sufficient reliability' " which members of the group will risk damage to offspring if they remain in high-risk positions. *Id.*, at 414-415; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 238 (quoting district court). Similarly, to establish the unavailability of alternatives the employer must show that "the substance or process

causing the claimed hazard is itself reasonably necessary to the normal operation of its business" and that "exposure to the claimed hazard is also reasonably necessary to the normal operation of its business." U.S. and EEOC *Amici* Br. 22.[50] Thus, contrary to the UAW's contention (Br. 24, 35-36 n.31), the BFOQ standard neither invites nor tolerates an "unreasonably dirty workplace."

Of course, an employer's subjective good faith beliefs—let alone "archaic or stereotypical notions"—are wholly insufficient to establish a BFOQ defense. The employer's policy instead must be grounded "on the best available scientific data." *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190 n.27 (CA4 1982). Courts should evaluate that data with several considerations in mind. *First,* the BFOQ standard is not that of absolute necessity but rather *reasonable* necessity. It would be decidedly unreasonable, for example, to require an employer to *prove* that a given employee *will* conceive and then *will* deliver a brain-damaged child if not transferred to a safe work station. Such an impossible standard would not square with this Court's cautious approach to safety issues.[51]

[50]The United States and the EEOC in their *amici* brief (at 9-10, 21-22) propose a six-factor BFOQ analysis. Their additional factors are all subsumed in the adequate-but-less-discriminatory-alternatives analysis as followed by the courts of appeals and as specifically applied by the Seventh Circuit in this case. Although we believe the analytical framework formulated by the courts of appeals is the most appropriate one, there is thus no conflict between that framework and the one proposed by the United States and the EEOC.

[51]"The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case. The employer cannot be expected to establish the risk of [injury] 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.' " *Western Air Lines, Inc.* v. *Criswell,* 472 U.S., at 419-420 (citation omitted). For this reason, the courts of appeals have all agreed that proof to a certainty on risk issues is not required, but instead proof that " 'within the qualified scientific community . . . there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.' " Pet. App. 32a (quoting *Olin,* 697 F.2d, at 1191); see also *Hayes* v. *Shelby Memorial Hospital,* 726 F.2d, at 1548-1549.

Second, in grounding its policy on "the best available scientific data," the employer necessarily should be allowed to act on the basis of *present* medical knowledge and not be precluded from action on the basis of speculation about what future research may reveal. For example, where (as here) the evidence of male-mediated fetal harm at the blood lead levels in question "is, at best, speculative and unconvincing" (Pet. App. 34a), an employer must not be barred from responding to an "overwhelming" body of "convincing scientific evidence" demonstrating irreparable fetal brain damage from *in utero* exposure to equivalent maternal blood lead levels (*id.*, at 32a, 53a). As the Eleventh Circuit reasoned in *Hayes* v. *Shelby Memorial Hospital,*

> "[i]n those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women. *As additional research on men becomes available, however, the employer must adjust its policy or risk running afoul of Title VII.*" 726 F.2d 1543, 1549 (1984) (emphasis added).[52]

Finally, notwithstanding the properly rigorous nature of the BFOQ inquiry, courts should be hesitant when evaluating suggested alternatives "in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson* v. *Fort Worth*

[52]Thus the UAW is wrong in suggesting that a BFOQ analysis frees the employer from responding to new scientific information and developments in technology. UAW Br. 25. The Court of Appeals emphasized these continuing employer obligations in its opinion below. See Pet. App. 36a, 59a n.43.

The evidence in this case, of course, goes well beyond the *Hayes* standard quoted above. Here there was not simply a *lack* of evidence regarding male mediation at the blood lead levels in issue. Rather, as the Court of Appeals emphasized, Johnson Controls submitted extensive expert evidence that, "without exception," established that these levels "did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." Pet. App. 33a; see also n.8, *supra* (citing evidence).

Bank & Trust, 487 U.S. 977, 998 (1988) (plurality opinion). The appropriate inquiry is whether the employer has " 'reasonable cause to believe, that is, a factual basis for believing,' " that potential alternatives would be inadequate. *Dothard* v. *Rawlinson,* 433 U.S., at 333 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (CA5 1969)); see also *Western Air Lines, Inc.* v. *Criswell,* 472 U.S., at 422-423 (inquiry is whether employer has "a substantial basis for believing" that alternatives will not "insure" its appropriate goals).

Thus some deference is due an employer's business judgment, especially where the employer has already attempted alternatives to its policy and found them inadequate. This Court has emphasized that, because " '[c]ourts are generally less competent than employers to restructure business practices,' . . . the judiciary should proceed with care before mandating that an employer must adopt a [suggested alternative] in response to a Title VII suit." *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115, 2127 (1989) (quoting *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 578 (1978)). This caution is equally applicable to the BFOQ inquiry and should be at its zenith where the issue is safety—a matter "of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d, at 238.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

The UAW devotes virtually its entire brief to arguing that gender-drawn fetal protection measures are *per se* unlawful under Title VII, reserving only a few paragraphs at the end to argue that the judgment below should in any event be reversed. See UAW Br. 45-48. This focus is understandable. The choice of analytical framework and the allocation of proof burdens clearly were irrelevant to the outcome: the Court of Appeals emphasized that under *either* a BFOQ *or* a business necessity analysis, and *regardless* of which party bore the ultimate burden of persuasion, Johnson Controls was entitled to summary judgment. Moreover, the UAW specifically conceded in seeking this Court's review that "we do *not* argue . . . that if the court below is right on the law, the affirmance of summary judgment is wrong because there are contested factual issues." Pet. Cert. Reply Br. 6-7 n.4 (emphasis added).[53]

Instead, the UAW's abbreviated argument is that the Court of Appeals failed altogether to consider certain matters properly in issue and thus should be reversed. Its objections are not well-founded.[54]

Male mediation of harm. The UAW asserts that the Court of Appeals failed to consider the "male-mediation issue" with the burden of proof placed upon Johnson Controls. UAW Br. 46 & n.40. This is the *only* ground advanced by the United States and

[53]The UAW's certiorari papers nowhere even mention Fed. R. Civ. P. 56 or this Court's Rule 56 precedents. Particularly in light of the concession quoted above, it cannot be argued that the propriety of summary judgment under Rule 56 is "fairly included" in any of the questions set forth in the petition. See this Court's Rule 14.1(a). That issue is thus not before the Court for consideration. *Ibid.*

[54]Although the UAW in its brief (at 5 n.5, 21) now attempts to minimize the evidence of fetal risk, it conceded below that "the first element—the substantial risk of harm to the fetus—*has been established.*" UAW Seventh Circuit Br. 33 (emphasis added).

In addition to the points discussed in text, the UAW argues that "adult human beings and their live children" may be at risk at comparable blood lead levels. UAW Br. 46. This argument ignores the undisputed evidence that Johnson Controls already has in place an extensive health monitoring program to protect its employees from adverse lead effects *at any level;* when ill effects are detected, corrective actions, including removal when necessary, are taken *regardless* of specific blood lead levels. Those measures cannot be taken with the unborn. *See supra,* at 7 (discussing evidence). Moreover, *precisely* because children at home are at risk from employee lead exposure, Johnson Controls enforces elaborate safety and hygiene measures "to keep all the lead that an employee may contact in the plant in the plant, not to allow it to go home." Beaudoin Test., JA 87; see also Fishburn Test., JA 163. The UAW has never disputed that these stringent practices effectively protect child health.

the EEOC in their *amici* brief (at 24-26) as a basis for reversal. This contention is unwarranted.

As the Court of Appeals noted, the Rule 56 inquiry was whether " 'a rational trier of fact [could] find for the non-moving party' " on this issue. Pet. App. 31a (quoting *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The court found in the business-necessity portion of its opinion that there is "overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child" from the maternal blood lead levels in issue but that, in contrast, the evidence of comparable male-mediated risk "is, *at best*, speculative and unconvincing"; "[t]he facts the UAW posits do not negate" the evidence that Johnson Controls had presented demonstrating that, at these levels, "the ris' ` transmission of harm to unborn children is confined to fert' ,emale employees." Pet. App. 32a, 34a-36a (emphasis added). Thus a "reasonable factfinder" could not "reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead." *Id.*, at 34a. Given the court's conclusion that a rational trier of fact could not find male mediation at these levels in light of the "speculative" and "unconvincing" nature of the UAW's evidence, the allocation of ultimate proof burdens was *immaterial* to the outcome because a factfinder can *never* base its decision upon such evidence.[55]

Lest there was any doubt on this matter, the Court of Appeals emphasized in the BFOQ portion of its opinion—with the ultimate proof burden allocated to Johnson Controls—that lead at these levels "has been scientifically established to pose very serious dangers to young children *and, in particular, to the offspring of female employees,*" and that Johnson Controls had demon-

[55]See generally 6 *Moore's Federal Practice* ¶ 56.15[3], at 56-275 to 56-276 & n.55 (1988); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2727, at 165-169 (1983); see also *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968) (absence of "significant probative evidence" requires summary judgment).

strated that there was no way to protect "the health of the unborn" *other* than through "the exclusion of fertile women from high lead exposure positions." Pet. App. 48a, 58a (emphasis added); see also *id.*, at 51a ("intellectual and physical development" of unborn at risk through female exposure at these levels), 53a ("substantial and irreversible risk" at issue is caused by "lead exposure in the womb"). The argument for a remand on this point ultimately reduces to the proposition that the Court of Appeals committed reversible error in not also reciting in its BFOQ section that "we meant it when we said the male-mediation evidence is speculative and unconvincing and that a reasonable factfinder could not conclude otherwise." That is simply an invitation to ask the court to reiterate what it clearly and adequately already has concluded.[56]

Animal-studies evidence. The UAW's petition for certiorari alleged that the Court of Appeals had "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans," going so far as to present this as a separate question for review. Pet. Cert. 15, 26 (emphasis added). It now confines the issue to a single footnote in its brief (at 46-47 n.40).

[56]Though the UAW asserts in passing that it believes there was "a substantial factual question" on the male-mediation issue, *that* Rule 56 question is not before the Court. See *supra*, at 41 & n.53. In any event, the evidence cited by the UAW and the United States creates no such question: (a) Contrary the UAW (Br. 46), OSHA did *not* conclude there is male-mediated fetal injury *at the blood lead levels in issue*, as opposed to an increased risk of temporary reduction in male fertility. See *supra*, at 5-7 & n.7. (b) Contrary to the United States (*Amici* Br. 24-25 n.23), Dr. Silverstein's literature review did not (by his own admission) reveal male-transmitted fetal harms *at these levels*. See n.9, *supra*. (c) Also contrary to the United States (n.23), Dr. Legator, far from supporting the UAW position on this issue, agreed that whereas fetal harm from *in utero* exposure *at these levels* is "well-documented and known," the possibility of comparable male-mediated harm is "an unknown." JA 257.

Properly quoted,[57] and placed in the context of the surrounding analysis, the Court of Appeals' discussion does not even remotely suggest a "categorical disqualification of animal studies," Pet. Cert. 27, but instead an analysis of the *particular* animal studies tendered and a rejection of any extrapolation to humans from those *particular* studies as "speculative and unconvincing," Pet. App. 34a. *Of course* animal studies can constitute an important predictive tool in appropriate cases, but "[t]he validity of extrapolation to humans from data derived from tests on animals" depends upon the particular facts of each case. *Environmental Defense Fund, Inc.* v. *EPA*, 167 U.S. App. D.C. 71, 78, 510 F.2d 1292, 1299 (1975).

Here there was substantial expert evidence that "[s]tudies of the effect on the offspring of lead exposed male rats cannot be readily extrapolated to the human male, particularly as to the dose necessary to cause reproductive effects."[58] The Court of Appeals accepted this expert evidence, emphasized the significant "differences between the effect of lead on the human and animal reproductive systems," and concluded that "[t]he UAW's animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion" that any male-mediated risks were at all comparable to the risks from *in utero* exposure to the blood lead levels in issue. Pet. App. 34a & n.29 (citing evidence). UAW experts *themselves* agreed that the evidence in this respect was entirely speculative.[59]

[57]As noted in our brief in opposition (at 22-23), the UAW misquoted the Court of Appeals' language in its petition for certiorari.

[58]Hammond Aff. ¶ 7, JA 73; see also Scialli Aff. ¶ 9, JA 181 (rodent studies in this area "cannot be extrapolated to humans" because "[t]he reproductive system of the rodent, in terms of transmissible changes in offspring due to exposure to toxic substances, is simply not analogous to the human reproductive system, male or female"); Chisolm Dep., JA 172-173, 176-177. Dr. Scialli offered as "[a] specific example . . . the drug Thalidomide which was used in the 1960's to treat pregnant women. This drug was given to mice and rats and did not cause any birth defects; however, the drug caused major limb defects in human offspring." Scialli Aff. ¶ 9, JA 181.

Adequate but less restrictive alternatives. Finally, the UAW criticizes the Court of Appeals for not having considered in greater detail a number of alternatives that the UAW now suggests might be adequate to protect fetal health and safety assuming, as the UAW does not, that this is a lawful motive under Title VII. UAW Br. 47-48. The UAW has failed to preserve this argument.

Johnson Controls demonstrated below that it had adopted its policy in response to the specific urgings of its medical consultants and the recommendations of the Centers for Disease Control. JA 94, 153, 183-184. Limiting the policy to women who actually *are* pregnant would not prevent fetal lead poisoning; because lead is an accumulative toxicant, a fetus would be at risk from maternal lead exposure that occurred long before conception. See *supra*, at 3-4 & n.4. Moreover, it would be " 'impossible or highly impractical' " for Johnson Controls to restrict its policy to those who actually *will* become pregnant. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 414 (citation omitted). Such a policy would not account for the reality of unplanned pregnancies; it would invite highly intrusive inquiries that would not protect against the risks involved;[60] and the company for five years had

[59]See, *e.g.*, Legator Dep., JA 257 ("certainly" agreeing that, whereas risks of *in utero* exposure "are well-documented and known," male-mediated risks are "an unknown in terms of the precise levels"); Brix Dep., JA 265 (animal studies suggest "an impact on the male reproductive tract . . . as low as perhaps say 40 to 50 blood lead. . . . [B]ut I cannot say that that's really the case in humans because we do not have good data in male patients, male subjects at those kinds of levels. So I'm hesitant to make a statement one way or the other. *We don't know*") (emphasis added). See also *supra*, at 5-7.

[60]In order to attempt to determine which employees will become pregnant, Johnson Controls would need continually to question them about—if not try to monitor—their birth control practices, sexual orientation and activities, and similar intimate matters. Putting aside the offensive nature of these measures, an employer obviously could not reliably police its employees' sexual behavior in this manner.

attempted a voluntary program (coupled with individualized employee counseling) but had continued to see "a substantial number of pregnancies" involving dangerously high maternal blood lead levels. Beaudoin Dep., JA 94; see *supra,* at 8-9.[61] The company also documented its careful consideration of other potential alternatives—including the elimination of lead from its operations altogether, whether additional technological safeguards could be used to reduce general lead levels even further, the use of other criteria for determining which specific jobs were likely to create unacceptable fetal health risks, further reliance upon respirators, and greater individualized testing—and explained why such potential alternatives were inadequate.[62]

The UAW simply ignored this entire issue on appeal and, in its words, "did not respond" to Johnson Controls' evidence. UAW Seventh Cir. Br. 36-37 n.14. Instead, it advised the Court of Appeals that, while the question of alternatives "*would ordinarily be at issue in a case of this type,*" it was *not* putting that question "at issue" in *this* case. *Ibid.* (emphasis added). As the Seventh Circuit emphasized, "[t]he UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy." Pet. App. 40a. The court specifically held that the UAW had waived the issue of adequate-but-less-discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4) and found, in the absence of any evidence to the contrary and since the matter was not at issue, that Johnson Controls had shown the reasonable necessity of its policy. Pet. App. 36a-38a, 53a-54a, 58a-59a.

[61]See also Beaudoin Aff. ¶ 17, JA 78; JA 85; Beaudoin Test., JA 95, 99-100; Fishburn Test., JA 153-154, 156; Scialli Aff. ¶¶ 11-12, JA 181-182; Whorton Aff. Ex. C, JA 192-193; Chisolm Aff. ¶¶ 9-11, JA 200-201; Pet. App. 40a-41a, 53a.

[62]See, *e.g.,* Beaudoin Aff. ¶ 17, JA 78; Beaudoin Test., JA 97-101, 103; Beaudoin Test. 129-130, 132-138, attached to Jaspan Aff. (R.38); Fishburn Test., JA 153-154. See also JA 17 ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels"); Pet. App. 40a-41a, 54a, 58a.

The UAW describes its waiver of the alternatives question as a "litigation decision," without explaining why *that* should now excuse its earlier choice not to put the question "at issue" in this case. Pet. Cert. Reply Br. 7. Its argument that its "declination" to contest the point should now be ignored because the matter involved a "far-down-the-line question" of "the most minimal significance," and its suggestion that it somehow was caught off guard by the Court of Appeals' consideration of the availability of the BFOQ defense, are baseless.[63]

Title VII cases are, of course, subject to the same rules of procedure and practice as other areas of civil litigation. *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983). One of those rules is that a party may not ignore an issue—let alone *expressly* waive it—and then turn around and

[63]The UAW represents that it decided not to put the alternatives question "at issue" because "the district court had held that a fetal protection purpose can *not* constitute a bfoq." Pet. Cert. Reply Br. 7 (emphasis in original). The District Court "held" no such thing, noting instead that it did not have to reach the issue. JA 17 n.5. Moreover, Johnson Controls had argued from the outset of the case that its policy passed muster under the BFOQ standard. See, *e.g.,* Answer ¶87, JA 53; Johnson Controls' Seventh Cir. Br. 14-20. As noted above (*supra,* at 16), the alternatives question is centrally important under both a business necessity and a BFOQ analysis. Instead of a "far-down-the-line question" of "the most minimal significance," Pet. Cert. Reply Br. 7, the lack of adequate alternatives was pivotal to the District Court's judgment. JA 17-18, 20. The UAW had an immediate obligation under Fed. R. App. P. 28 to contest this matter if it so desired, but instead decided not to and advised the Court of Appeals that adequate alternatives were not "at issue."

Perhaps the UAW's "litigation decision" grew out of its apparent general belief—which it candidly expressed to the Seventh Circuit—that "it is not usually considered good tactics to expose your case prematurely" before trial. UAW Seventh Cir. Br. 38 (*re* UAW's failure to take more discovery at the deposition stage in preparing to resist summary judgment motion). This conception is fundamentally at odds with a party's litigation obligations. See, *e.g., Celotex Corp.* v. *Catrett,* 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole").

criticize the court for not having resolved the (non)issue in its favor.

> "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's brief contain 'the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.' Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution. . . . [W]here counsel has made no attempt to address the issue, we will not remedy the defect . . . ." *Carducci* v. *Regan,* 230 U.S. App. D.C. 80, 86, 714 F.2d 171, 177 (1983) (citation omitted).

This view is squarely in accord with this Court's practice of not allowing a petitioner to advance arguments that it chose not to raise at the court of appeals stage. See, *e.g., EEOC* v. *Federal Labor Relations Authority,* 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted); *G.D. Searle & Co.* v. *Cohn,* 455 U.S. 404, 412 n.7 (1982) ("Because petitioner did not present this argument to the Court of Appeals, we do not address it"); *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981). That practice is particularly appropriate where, as here, the Court of Appeals found the issue was waived and the petitioner has not sought review of that determination.[64] Moreover, even if the factual issue of the feasibility of potential alternatives had not been waived below, it is not fairly included in the questions presented—to the contrary, the UAW specifically advised in its certiorari papers that it was *not* advancing the argument that "the affirmance of summary judgment is wrong because there are contested factual issues." Pet. Cert. Reply Br. 6-7 n.4.

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[64]Because Johnson Controls brought these matters to the Court's attention in its brief in opposition to certiorari (at 12, 19-21), there is "no reason to depart" from the Court's "normal practice" discussed above. *EEOC* v. *Federal Labor Relations Authority, supra,* at 24.

CONCLUSION

For all of the foregoing reasons, the respondent Johnson Controls, Inc. respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the manner of Napoleon's army on its return from Moscow, since *certiorari* was granted respondent Johnson Controls has abandoned much of its argumentative weaponry. Most particularly, except for a single footnote, respondent has jettisoned its claim—and the Court of Appeals' holding—that the fetal protection policy at issue here is a policy whose legality is to be judged under Title VII's "disparate impact-business necessity" theory.[1] Instead, respondent is now willing to "proceed[] on the assumption" (Brief for Respondent at 17 n.24) that the exclusionary employer policy in this case, which adversely affects women alone, involves classic facial sex discrimination and, under the plain terms of Title VII, is lawful only if justified under the bona fide occupational qualification ("bfoq") defense set out in § 703(e), 42 U.S.C. § 2000e-2(e), with the burden as to all elements of that defense on the employer. *Compare* Brief for Petitioners (Pet. Br.) at 12-26.

Thus, this case now centers on delineating the elements of the bfoq defense as applied to a situation in which an employer excludes *all* fertile women from a broad range of jobs because of concerns involving the

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[1] In one footnote, respondent does profess to "agree with every court of appeals considering the issue that fetal protective measures can be analyzed under a business necessity inquiry", and to agree as well with the Chamber of Commerce that the Pregnancy Discrimination Act (PDA) requires that "a plaintiff must first demonstrate that she has been treated differently from others whose employment in the job at issue would create a similar risk to unborn children." Brief for Respondent (Resp. Br.) at 17, n.24.

The first contention is refuted in our opening Brief (at pp. 12-25), and, as well, in the Brief of the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners (U.S. Br.) (at pp. 10-16), and needs no further response. As to the second contention, the short answer is that the PDA does *not* specify that women affected by pregnancy and related conditions must be treated the same as others who "would create a similar risk to unborn children," but the same as those "similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

health of any children those women *might* conceive while employed.

In this regard Johnson Controls' position is that the elements of the bfoq defense are the *same* as those recognized by the Court of Appeals in this case under the "business necessity" rubric, with the only difference being that the burden of proof as to all these elements is upon the defendant employer, *not* the plaintiff employees. According to respondent, if the employer shows a workplace condition that creates a substantial risk of harm to employees' offspring;[2] transmission of that harm to offspring through one sex only;[3] and the lack of a less dis-

[2] Respondent states this element as applying only to "toxic hazards." Resp. Br. at 16. There are, however, many other asserted risks to fetal health in modern day workplaces, including, *inter alia*, radiation, stress, infection, air pollution, heat, cigarette smoke and noise. Indeed, since the filing of our opening Brief, examples of reports providing some evidence of such particularized fetal risks have continued to appear. *See, e.g.*, Miller et al., *Pregnancies Among Physicians: A Historical Cohort Study*, 34 Journal of Reproductive Medicine 790 (1990) (women practicing physicians had four times the premature births of other women, perhaps because of stress or long hours standing). *See also* Pet. Br. at 43-44; Pet. App. 100a. (Easterbrook, J., dissenting) ("Risk to the next generation is incident to all activity, starting with getting out of bed."). There is in short no basis in Title VII or in reason for carving out a special fetal protection rule for *toxic* hazards.

[3] On this question, *none* of respondent's experts pointed to any animal *or* human studies *showing* that there is *no* such male mediated effect; they simply relied on the *absence* of any definitive proof through human studies of such an effect. *See* Resp. Br. at 6.

Petitioners' experts, in contrast, pointed to a wide range of both human and animal evidence, explaining while "we probably never will have [definitive human studies] because of the very nature of the problem" (J.A. 256, 258 (Legator)), human studies indicate male mediated fetal loss, fertility problems, abnormal sperm, and chromosomal abnormalities at levels both above and under the general OSHA lead limit, all of which are strongly indicative of genetic defects at low levels of exposure (J.A. 207, 215, 216-17 (Silverstein); 252, 255, 259 (Legator); (J.A. 236-238 (Silbergeld), and animal studies likely to be pertinent to human physiology, showing fertility effects, abnormal sperm, and learning deficits in offspring at exposure levels in all likelihood functionally comparable to the blood lead levels at which respondent allows men to work (J.A. 207, 210, 211 (Silverstein); 237 (Silbergeld); 251-52 (Legator)).

Summarizing this evidence, Dr. Marvin Legator, Director of Environmental Toxicology at the University of Texas Medical Branch and former Chief of the Genetic Toxicity Branch of the Food and Drug Administration, stated that "putting the whole thing together, humans, animals . . . one would have to conclude that lead is . . . [the] one [chemical] that has been studied to a great extent . . . that probably causes a genetic lesion during spermatogenesis" (J.A. 256), which in turn indicates "transmissible genetic damage . . . later manifested by abnormalities such as behavioral abnormalities" (J.A. 255) at levels below the current OSHA standard (J.A. 256-259).

Respondent maintains that in the face of this evidence and expert opinion, the Court of Appeals was correct in holding that the employer had proven definitively that there was *no* male mediated effect. But in its business necessity analysis the Court of Appeals only considered the question of whether "the *UAW* . . . has present[ed] present facts sufficient to carry [the] burden of demonstrating *the absence* of . . . the risk of transmitting lead exposure to unborn children only through females," putting great emphasis, as this quotation indicates, upon its *erroneous* placement of the burden of persuasion. Pet. App. 35a, 28a-32a (emphasis supplied). The conclusion below that the UAW had not done so can *not* be transmutted into a holding that respondent had carried its burden of proof.

Indeed, we submit that judgment cannot be awarded in respondent's favor on this question since the employer did *not* present any affirmative evidence that males do *not* risk fetal health injuries due to lead exposure while the petitioners did present substantial evidence of such a risk.

[4] By concentrating on the central legal question in this case, we do not mean to suggest that we accept respondent's version of the facts, or of how the law is to be applied to those facts.

This case was decided on summary judgment in favor of the defendant employer. What that procedural circumstance means, of course, is that where there is a substantial conflict in the record sufficient to permit a finding against the party bearing the burden of proof on a particular factual issue—in this instance, primarily on questions of scientific fact as testified to by competing experts—

criminatory protective alternative, the employer has justified a policy excluding that sex from its workplace. Resp. Br. at 16.[4] This statement of the governing law is trebly flawed.

1. *The BFOQ's "Comparison of Fetal Risks to Adult Risks" Requirement.* Respondent's Brief proceeds on the unstated, unexamined assumption that Title VII permits an employer to single out fetal risks as the *only* risks to human health against which the employer will provide perfect, zero-risk protection. That assumption can not withstand reasoned scrutiny.

According to this approach, it would be permissible for an employer in the interest of protecting fetuses from health risks to exclude all fertile women from its manufacturing workforce—regardless of their age, marital status, sexual activity, or other factors affecting the likelihood that they will conceive a child—while continuing to expose the employees the employer does hire to risks of comparable severity and probability.[5]

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neither one version nor the other can be taken as established. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same). While the propriety of granting summary judgment, *assuming a proper legal standard*, is not before this Court, because not an independently certworthy question (Petitioner's Reply Brief on Petition for Writ of Certiorari (Reply Br.), at 6-7 n.4), our contention in this case is that for a myriad of reasons, the proper legal standard was *not* applied. In evaluating that contention, and in applying the *proper* legal standard to this case, the Court must take the summary judgment record as it is, and not, as respondent apparently believes, as if that record consisted only of the testimony on disputed facts that favors the defendant employer's position, or as if the courts below made fact findings binding on this Court, even where those courts ignored the plaintiff employees' evidence or made statements without any support in the record.

[6] It is important, because respondent's arguments obscure the point, to be clear that risk assessment involves both a qualitative factor *and* a quantitative factor.

In the first regard, there has never been a dispute in this case about the fact that the *kind* of harm caused to fetuses and young children by lead exposure is significant.

The quantitative issue is, however, much more uncertain. Perhaps most to the point, because the employer here excludes all fertile women, and not only pregnant women, *quantitative* risk assessment must include some calculation of the likelihood that individual women employees will become pregnant during a time when

The obvious net effect of this suggestion would be to *permit employers to exclude all fertile women from almost all nonsedentary jobs* and many other positions as well. That is foreordained because the same safety and health dangers that affect adults in such jobs obviously endanger as well, to at least the same degree, any possible fetus that a fertile woman employee *might* conceive.[6]

Moreover, employers in general, and Johnson Controls in particular, clearly do *not* regard an overall *zero-risk* safety and health risk protection program as "reasonably necessary to the normal operation of [their] business" (§ 703(e)), as a whole, any more than individuals (including pregnant women) conduct their daily lives on an entirely risk-free basis.

To the contrary, despite pious incantation of "the overriding importance of industrial safety" (Resp. Br.

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the employee's lead blood levels are elevated. But, no such risk calculation has been made. Nor was there any attempt to quantify other than by vague generalizations (*see* Resp. Br. at 2 & n.2) how likely it is that a particular child born to a woman with a given blood lead level will in fact exhibit any learning deficit whatever. *See* Pet. App. 90a (Easterbrook, J., dissenting).

[6] The policy rationales put forward in this case on respondent's behalf also fail to distinguish between the situations in which there is *some* substantial risk to fetal health, and those in which there is a special risk *only* to the fetus (or a much higher risk to fetal health than to adult health).

For example, an employer's *legal* duty to fetuses, or to children not yet conceived (Resp. Br. at 27-29), exists with respect to *any* pregnant or potentially pregnant employee, and whether or not the fetus is *particularly* susceptible to a certain hazard. Similarly if, as the Court of Appeals suggested, an employer may single out fetal health for *greater* protection than employee health because "[t]he unborn child has no opportunity to avoid this grave danger," while the mother can make a " 'decision to weigh and accept the risks of employment' " for herself (Pet. App. 51a, *quoting Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)), employers would have the latitude to overrule the mother's decision to drive a car as part of her employment while pregnant since "a female employee might somehow rationally discount [the] clear risk" (Pet. App. 51a) to fetal health should an accident occur.

at 30), it remains true that in general, the health and safety protection generally regarded as *proper* protection is not *perfect* protection: Automobiles can crash, people can fall, health care workers can become infected with diseases, and so on. Consequently, even where the risks to fetuses and to adults *do* differ somewhat in the type of danger posed or in the degree of danger at various exposure levels or circumstances, under a zero-risk fetal protection policy that excludes all fertile women, there is a major difference in the *degree of protection* provided against fetal risks and against adult risks overall (including reproductive risks that do not result in fetal effects).[7]

In the specific lead exposure context presented here, batteries can and do explode;[8] sudden changes in lead exposure can occur, due to employee carelessness or otherwise;[9] employees can fail to follow hygiene procedures and carry lead home on their clothes to expose their children;[10] adult employees in lead-exposed jobs can

[7] This is true, we emphasize, even where adults suffer *different* risks at the levels of exposure at which fetuses are in danger, or even where adults suffer *no* risks at those levels of exposure. For the issue is whether adults suffer risks from the same hazard that affects fetuses at the higher levels to which adults are *in fact* exposed in the plant, or whether adults suffer industrial risks of equivalent qualitative and quantitative magnitude due to *other* hazards in the plant. If so, then the level of risk protection accorded fetuses—perfect protection—is not "reasonably necessary" to the "normal operation" of the plant.

[8] *See Jones, et al. v. Sears and Roebuck, Inc., Globe Union Inc., et al.*, No. 585-427 (Cal. Super. Ct., San Diego County, May 17, 1987), *appeal filed* No. D009904 (Cal. Ct. App., 4th App. Dist., Div. 1, filed Apr. 10, 1990) ($9.7 damages award against Johnson Controls for injury due to an exploding battery.)

[9] *See* J.A. 153 (Beaudoin) ("in an average manufacturing facility . . . [lead exposure] conditions change so quickly, that you can have an overexposure which you may not detect until it shows up in the circulating blood two to eight weeks later"); J.A. 118 (blood lead levels measured only every six months if the last level was under 40 mg/dl.)

[10] J.A. 158 (Beaudoin); J.A. 174-75 (Chisholm).

suffer ill effects from lead, including strokes or heart attacks,[11] as well as reproductive damage through injury to sperm.[12] While the record does not permit the quantification of any of these risks, the facts adduced do suggest that each is substantial. Specifically, there was expert testimony to that effect (*e.g.*, J.A. 243, 246 (Silbergeld)),[13] and fifty-seven of respondent's employees filed lead-related worker compensation claims from 1976-1986 (R. 47, Ex. D, Dft's Response to Pltfs' Interrogatory No. 8), with several recovering substantial awards (*id.*).[14]

The reason Johnson Controls abides these risks to its employees, obviously, is that, *on balance*, respondent believes, rightly or wrongly, that given the need to produce goods and otherwise to conduct its affairs, *zero risk* health and safety is not necessary to its business, much less possible.

Title VII's major purpose is to compel employers to give equal employment opportunity concerns supervening value in making employment decisions; that is why the *only* defense to facial sex discrimination, the bfoq, is "the

[11] These effects, and attacks, can occur between company-mandated periodic medical examinations, if any. *See* J.A. 130, 136 (except where there are perceptible symptoms, medical examinations are conducted only for those incumbent employees with more than 40 mg/dl blood lead level or higher, and then only annually); Pet. Br. at 8 n.9. In addition, there are some ill effects which cannot be predicted readily through medical examinations, at least until the damage is done. J.A. 227, 262 (cancer, mood changes, impaired memory).

[12] Respondent conceded that there is evidence in the record confirming an elevated risk of reduction in male sterility at levels at which male employees are allowed to work. Pet. Br. at 6-7 (summarizing evidence of male reproductive effect). *Compare* J.A. 116-119, 134-137 (setting out biological and medical tests routinely conducted, without indicating any sperm tests).

[13] *See also* Pet. Br. at 6-8 (summarizing evidence on non-fetal occupational health effects of lead). *See also* Landrigan, *Lead in the Modern Workplace*, 80 American Journal of Public Health 907 (1990).

[14] Johnson Controls' extensive health monitoring system was in effect throughout that period. J.A. 92, 104, 127.

narrowest of exceptions to the general rule requiring equality of employment opportunities." *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977). *See generally* Pet. Br. at 42-45. At the very least, then, an employer attempting to establish a bfoq defense should be required to show that the employer gives as much weight in making risk-benefit calculations to Title VII values as to production and other business values. This equivalence is best tested by determining the quantitative and qualitative nature of the health and safety risks the employer otherwise "normally" abides in its "particular business," and comparing the degree of protection accorded fetuses on a gender-specific basis to that benchmark.

Indeed, Congress, in overruling *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), specifically intended to prevent employers from singling out any of the "whole range of matters concerning the childbearing process" (H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. (1978)) for more detrimental treatment than that accorded other comparable workplace health-related matters. *See* 42 U.S.C. § 2000e(k); Pet. Br. at 32-33. In the present context, that principle *at a minimum* requires that just as employers may not, under the Pregnancy Disability Act (PDA), ignore the functional similarity between pregnancy-related disabilities and other disabilities for disability insurance purposes, so employers may *not* treat the female-specific risks to human health, that may occur because fetuses, enclosed in their mother's bodies, necessarily come to the workplace with their working mothers, as more important than other risks to human health.

In short, under Title VII, an employer may *not* invoke the bfoq defense to justify perfect fetal protection through exclusion of all fertile women when the employer does not otherwise run a zero-risk business.[15] On

[15] There is *nothing* in the Court of Appeals majority opinion that so much as pays notice to the question whether Johnson Controls protects the health of employees and other adults *to the same degree* that respondent protects fetal health. Rather, in both its bfoq analysis and business necessity analysis, the Court of Appeals

this basis alone, the judgment below must be reversed.[16]

focussed *only* on "Johnson's interest in protecting the health of the unborn through the female employee." Pet. App. 55a. This is true even though there was extensive evidence by the petitioners' experts on adult health effects *at the levels of exposure in question* (*see* Pet. Br. at 7-8), and even though a major part of the argument made in the briefs to the Court of Appeals was that the comparison issue is critical (*see* Reply Br. at 9-12; Pet. App. 50a-59a).

Further, the single footnote in Respondent's Brief (n.54, p. 41) devoted in any way to the question of comparative risks provides no *conceptual* basis for focussing on the fetal risk question in a case of this kind to the exclusion of all other risks, but makes only a single *factual* argument: Adult health risks created by lead, says respondent, can be individually monitored, and "corrective actions, including removal *when necessary*" can be taken. (Emphasis supplied). But while some adult risks can be monitored, and some are, the record certainly does not establish that *all* the adult risks (such as cancer, mood swings or subtle neurological impairment) can be monitored in time the prevent their effect, or that *all* the relevant risks (including impairment of sperm function) that can be monitored *are* monitored, or, most importantly, that adult health risks are *perfectly* protected by *prospective* removal of anyone who *might* develop an ill-effect. *See also* J.A. 233-35 (Silbergeld) (blood tests conducted by Johnson Controls would *not* necessarily provide a "clear cut answer" concerning male fertility problems, and those problems might or might not be reversible.) Indeed, the latter is clearly *not* the case, since, for example, annual medical examinations and blood testing bi-monthly or every six months will not preclude the possibility of elevated blood pressure, or sudden heart attack or stroke due to hypertension, between examinations or testing.

[16] On this record one cannot even begin to do a comparative risk analysis, since there is no way to quantify the actual risk of birth defects through maternal exposure. Such information as there is suggests that the risk is quantitatively very small, and therefore not likely to be substantially greater than the other risks to employee health respondent accepts without question.

Respondent represents the record as establishing that there were, under the 1977 policy that cautioned women about fetal risks but did not exclude them against their will from job opportunities, "a substantial number" of pregnancies of women with blood lead levels "well in excess of 30," and that "one of the infants born to this group showed early signs of lead poisoning." Resp. Br. at 9. The facts are these: From 1979 to 1982 there were six births to mothers with a greater than 30 mg blood lead levels during the month of conception; the median blood lead level of that group was

See Pet. App. 88a-95a (Easterbrook, J., dissenting) (surveying the impossibility of addressing the comparative risk issue on the present record.) [17]

2. *The BFOQ's "Reasonably Necessary" Requirement.* Johnson Controls maintains, too, that a facially discriminatory policy is "reasonably necessary" within the mean-

37 mg; in only one instance was the child recorded as having high blood lead levels, although the record does not say what was considered "high"; and there is *no* indication that any of those children had a birth defect. Beaudoin Aff. Ex. K (R. 37). (The evidence cited by the Court of Appeals (Pet. App. 7a-8a) that supposedly confirms an actual birth defect does not concern, as far as the record shows, a woman known to have an elevated blood level, nor does the testimony indicate that the child had high blood lead levels when born, rather than afterward. R. 38, Ex. A, Fishburn Depo. at 72-73.) It is, moreover, unclear how many women employees were in lead exposed jobs at Johnson Controls during the relevant periods, or how many of them became pregnant; the record shows only that there were 275 women employed as production employees two years *after* the mandatory exclusion policy for non-incumbent women went into effect. J.A. 70.

Given this imprecision, the most one can say on the present record (using the 275 figure although it is probably low, and the one elevated blood lead birth, although it is probably high) is that it appears that even with warnings "more likely to allay than to arise concern" (Pet. App. 70a (Posner, J., dissenting)), the probability that a child was actually born to a Johnson Controls employee with elevated blood lead levels over a several year period—let alone with any perceptible learning problem, as to which there is *no* direct evidence—was a very small fraction of one percent. In short, substantially more than 99 percent of the women excluded from jobs during that period did *not* pose any danger to any future children they conceived. (A calculation of this kind could come out very differently if the exclusion were of pregnant women only, although that estimate as well is impossible on the present record (since the total number of pregnancies is not known).)

[17] Further, as Judge Easterbrook also noted, any fair comparison of the risk protection for fetuses and the general level of health and safety risk protection afforded by an employer would include some way of factoring in the economic injury caused by a particular exclusionary fetal-protection policy, and of accounting for the liklihood of injury to fetuses due to that economic injury to the mother. Pet. App. 94a; *see also* Pet. App. 71a (Posner, J., dissenting); Pet. Br. at 39-40.

ing of Title VII's bfoq defense if there are no "adequate but less discriminatory alternatives" to the discriminatory policy; and that, of necessity, there are no such alternatives if it is "impossible or highly impractical" to ascertain a health risk on an individual basis. Resp. Br. at 37-38.[18]

The flaw in this contention is that in the fetal protection context the bfoq requires the employer to demon-

[18] Johnson Controls goes on to maintain that in the Court of Appeals petitioners waived their claims as to the legality of an exclusion of all fertile women by declining *under a disparate impact/business necessity standard* to bear the burden of proof on the question whether the employer could provide protection through alternatives with a lesser impact upon women. Resp. Br. at 12 n.20, 46-48.

This waiver argument rests on the false premise that this case is governed by a "business necessity" standard. Respondent, as we noted at the outset, continues to try to dragoon the rules developed in the disparate impact context (as to which there is no statutory language concerning the elements of proof, and as to which the burden of proof on all elements remains on the plaintiff (*Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2126 (1989)), into the bfoq defense. But the explicit statutory bfoq language does not refer to less restrictive alternatives as a separate factual element at all, but requires generally that *the defendant employer* prove that the particular *gender-specific* qualification the employer chose is "reasonably necessary" to its business.

Where the employer chooses to make its "reasonably necessary" proof by demonstrating a harm that only a few of the women excluded will actually suffer or cause, the employer may have proved that it is "reasonably necessary" to exclude those women, but the employer has not met the statutory requirement of demonstrating that *sex* is a bona fide qualification "reasonably necessary" to the essence of the business. Against that legal background, it is plain that petitioners certainly did not excuse respondent from meeting *its* burden of proof as to the most central element of its defense by declining to present affirmative evidence on a question which arises under an entirely different statutory theory.

Indeed, the Court of Appeals so recognized, since that court analyzed at length (albeit in our view incorrectly) whether respondent had proven the "reasonably necessity" of its gender-specific qualification for employment, and never suggested that the issue had been waived. Pet. App. 52a-59a.

strate that "all or substantially all" of the individuals who are denied employment opportunities present a substantial risk to real children—that is, children who are likely to be born—rather than hypothetically possible children. *See Grant v. General Motors Corp.*, —— F.2d —— (6th Cir. No. 89-3478, July 20, 1990); Pet. App. 60a n.1 (Judge Cudahy, dissenting). Thus, respondent's position does *not* provide a justification for a fetal protection policy that excludes *all* fertile women.

Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *City of Los Angeles, Department of Water v. Manhart*, 435 U.S. 702, 708 (1978). While

> [f]or some jobs, . . . there may be relevant skills that cannot be identified by testing[,] [y]et Title VII clearly would not permit use of . . . sex . . . as a proxy for such an employment qualification, regardless of whether a statistical correlation could *Norris*, 463 U.S. 1073, 1085 n.15 (1983).]

be established. [*Arizona Governing Committee v.* Against this background, the basic understanding is that in the ordinary situation—including one in which some sort of occupational safety issue is involved—gender cannot be a bfoq unless "'all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" *Dothard v. Rawlinson*, 433 U.S. at 333.

Johnson Controls counters that *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), is to the contrary (Resp. Br. at 40); respondent vastly overreads that opinion.

The *Criswell* Court affirmed a judgment that under the Age Discrimination in Employment Act, commercial flight engineers can be removed from their positions at the age of 60. In so doing the Court held that where "the essence" of the business in which individuals are employed is *safe mass transportation* (472 U.S. at 420-421), an employer can meet its "reasonably necessary" burden by showing *either* that "all or substantially all

[persons over the age qualifications] would be unable to perform . . . the duties of the job involved" or, alternatively, that "some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class," (*id.* at 414-15).

Criswell's second alternative is in obvious tension with the general principles emphatically stated in *Manhart* and *Norris*, summarized above. Since *Criswell* gives no indication of an intent to abandon or overrule these principles, it appears that this aspect of its holding is specific to a very narrow range of circumstances. And, indeed, this aspect of *Criswell* was developed in a case which stressed that "'the *lives of numerous persons* are completely dependent on the capabilities of the job applicant'" (*Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234 (5th Cir. 1976) (emphasis supplied), and has *only* been applied in instances in which there is a potential for a *mass public safety disaster* if the individual in question could not carry out his or her job duties properly for health reasons. *See* cases cited in *Criswell*, 472 U.S. at 415 n.23; *see also* Pet. Br. at 31; and *Criswell*, 472 U.S. at 415 (citing legislative history showing that Congress intended the individualized testing requirement to apply "'[f]or example, in certain types of *particularly arduous* law enforcement activity.'" (emphasis supplied)).

Thus, as far as we are aware, *Criswell*'s second test has never been deemed applicable to ordinary occupational safety issues. For example, although any use of tools or machinery involves safety considerations, *Criswell's* "individualized testing" rationale has not heretofore been thought to justify banning older employees from all such jobs. *See also Dothard v. Rawlinson, supra.* By the same token, we do not believe that *Criswell* permits employers to erect inflexible age barriers for the employment of salesmen because salesmen have to drive cars as part of their jobs, although a salesman could

certainly be discharged if the employer had an *individualized* basis to question his or her ability to drive safely.

Since it is thoroughly implausible that *Criswell's* "individualized testing" rationale is intended to apply *whenever* safety considerations are implicated by a Title VII case, the question becomes whether that rationale has any application to the present kind of case. We submit that, for two reasons, the answer is "no."

First, this is *not* a situation in which the main "risk" that, in the employer's view, justifies a broad ban on *all* fertile women—the possibility that any fertile women *could* (by definition) become pregnant—"cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Criswell*, 472 U.S. at 414.15. To be sure, the *employer* cannot obtain that information with any accuracy without an unacceptable intrusion in to the personal lives of employees. *But* the woman herself (like the plaintiff Elsie Nason, who was 50 years old and divorced (Pet. Br. at 9)) may be well aware of facts that absolutely preclude her pregnancy, or may resolve, upon receiving full information from the employer regarding fetal risks, as required by the Occupational Safety and Health Act, either to take extraordinary steps to keep her blood lead level low (such as respirator use or special training) or to use reliable contraception as long as she works in a lead-exposed job.[19] In contrast, the main risk at issue in *Criswell* situations —*viz.*, those in which individual testing is insufficient— are subtle, internal health issues of which the employee herself is ordinarily unaware.

Second, in this situation, the *primary* responsibility to protect an employee's child from harm is that of the mother herself, and our society generally assumes that she will discharge that obligation better than third parties. Thus, in a case allowing parents to commit their minor children to a mental institution, this Court noted:

> [H]istorically, [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children . . . . That some parents "may at times be acting against the interests of their children . . . creates a basis for caution, but is hardly a basis to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest. . . . Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents . . . [*Parham v. J.R.*, 442 U.S. 584, 602-603 (1979)].

In contrast, an employee in a *Criswell* situation has no preexisting obligation to the third parties being protected, nor is there a core societal judgment that in the vast majority of cases he or she will act with the best interests of the customers or the public in mind.

These two factors, taken together, deflate any contention that the inability of the *employer* to know who is planning to, or might, become pregnant suffices to create a situation covered by *Criswell's* "individualized testing" rationale.

3. *The BFOQ's "Occupational Qualification" Requirement.*

a. In our opening Brief, we stressed that because fetal protection policies do *not* involve *"occupational"* qualifications at all such policies do not come within Title VII's carefully drawn bfoq provision. Pet. Br. at 25-45. We relied on *Dothard v. Rawlinson*, 433 U.S. at 333-34, for the basic proposition that "the restrictive language of § 703(e)," *inter alia*, indicates that "the bfoq exception was in fact meant to be an extremely narrow exception," and added that dispensing with that limitation would greatly—and impermissibly—expand the exception.

At bottom, Johnson Controls response to our argument is that reading the bfoq as " 'a broad exception

[19] One of Johnson Controls' experts put the matter this way: "[T]o exclude . . . from work with lead . . . women of child bearing age . . . is clearly discriminatory if one considers the demographics of family size, age and parity, marital status and the widespread use of birth control in the U.S. . . . ." J.A. 194 (Whorton).

. . . [that] would largely emasculate the act' " (*Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971)) is perfectly acceptable. *See* Resp. Br. at 19 n.26.[20] It suffices, we believe, to point out that respondent —while making a brave show—is unable to point to *any* case in which a bfoq defense *has* been upheld where the asserted justification did not involve in any way the employers' interest delivering the business' product or service.[21]

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[20] We note that accepting this basic proposition does *not* lead inescapably to the conclusion that *any* mandatory policy protective of fetal health but applicable to already-pregnant women would also be invalid under Title VII. Where only the period of pregnancy is involved, solutions such as temporary transfers and paid leaves become economically plausible. Moreover, once a woman is actually pregnant, the comparison to other industrial health and safety situations becomes somewhat more colorable, since the existence of health concerns at that point pertain to an actual fetus, rather than to a hypothetically possible one. It may be, given those differences, that an employer could demonstrate, by comparison to policies the employer applies to other employees who temporarily present some sort of particularly heightened and immediate health risk, that a carefully devised policy applicable to pregnant women alone is not discriminatory, in that *similarly situated* individuals are treated the same regardless of gender.

[21] The privacy cases respondent cites (Resp. Br. at 25), for example, directly involve the employer's business interest in serving the customer, client, or patient.

In arguing for opening up the bfoq defense beyond performance-related criteria, respondent's sole reference to the statutory language is to the word "normal." Relying on Judge Posner's opinion below, respondent maintains that "normal" does not refer only to the way that the "particular" business *usually* operates, but to how the business *should* operate, applying "ethical, legal and business concerns" (Pet. App. 64a-66a) external to the business itself. With all deference the passage in question indicates that Judge Posner is better at economics than linguistics.

While, as Judge Posner noted (Pet. App. 64a), it is not "normal" today to produce batteries with slave labor, even a committed abolitionist would have said in 1860 that it *was* "normal," though wrong, to grow cotton in the South with slave labor. Similarly, in *Dothard v. Rawlinson, supra*, the Court recognized that the violence in that prison, although unconstitutional, was part of the "normal operation

b. Johnson Controls' efforts to find support for broadening Title VII's bfoq provision in the views of regulatory and advisory federal agencies (Resp. Br. at 21-24), are equally unavailing.

First and most importantly, this is a Title VII case. The ultimate *policy* question pertinent here that Congress addressed in enacting Title VII is whether *individual employers* should be allowed to override the decisions of individual employees regarding proper health precautions for any children those employees may choose to have.

That policy issue is quite different from the one that arises where an expert *government agency* makes a particularlized decision about child health under its power to protect the public health and welfare, in two regards: (i) The government is in a better position than an individual employer to collect and objectively analyze all the available scientific information. (ii) The government is also in a better position to consider the *entire* set of factors pertinent to the complicated balancing of risks at issue, including the consequences of female unemployment and underemployment for child health and welfare, and for the government's health, welfare and unemployment costs. *See* Pet. Br. at 36-42. That Congress decided *not* to allow individual employers fundamentally to compromise equal employment principles as a means of protecting fetal health in no way portends a later determination that the *government* cannot do so in particular exigent circumstances, under a statute permitting such a fetal protection policy.

In any event, respondent's assertions notwithstanding, the fact is that *no* governmental agency has determined that employers may broadly ban women on a gender-specific basis from employment to protect fetal health. The Occupational Safety and Health Administration (OSHA) certainly has not: In the sentence just before

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of that *particular* . . . enterprise." 42 U.S.C. § 2000e-2(e) (emphasis supplied). The dictionary definitions respondent cites (Resp. Br. at 18 n.25) are not to the contrary.

the one respondent quotes, OSHA, far from endorsing "gender-specific fetal protective measures" (Resp. Br. at 23 n.31), recognized that, on a gender-*neutral* basis, "temporary medical removal may in particular cases be needed for *workers* desiring to parent a child in the near future, or for particular pregnant employees," and confirmed in the next sentence that the category of "workers" includes both "[s]ome males" and "some women." 43 Fed. Reg. 52,974 (1978) (emphasis supplied).[22]

Nor has the Environmental Protection Agency (EPA) sanctioned the allocation of job opportunities according to gender-based criteria. EPA did decide in one instance, in a situation that was declared to be an "emergency", that a particular, unregistered pesticide could be used, in a few locations on a temporary basis, except by fertile women. However, EPA eventually banned that pesticide for all uses, and in any event was concerned only with proscribing the use of a certain chemical to perform a limited task, not with whether an employer could exclude all fertile women from his work force. 43 Fed. Reg. 47777 (1978); 44 Fed. Reg. 11112 (1979) (determinations of emergency); 47 Fed. Reg. 46885 (1982) (providing for expiration of all permission to use the pesticide as of June 30, 1983).

The Center for Disease Control (CDC) Report which respondent emphasizes is also entirely beside the point here. As Dr. John Rosen, the Chairman of the CDC Advisory Committee on Childhood Lead Poisoning, appearing as *amicus curiae* in this case in *opposition* to respondent's position, states:

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[22] Further, OSHA was contemplating only "temporary" removals, not permanent exclusion, and only for those employees with an expressed intention to bear a child, not for employees with no intention of doing so. 43 Fed. Reg. 52974 (1978). Indeed, OSHA's reference to the possibility of temporary removal for "an employee who is pregnant or who is planning to conceive a child" (29 C.F.R. § 1910.1025 App. C, p. 182; *see* Resp. Br. at 23 n.31), is *on its face* gender neutral, since men as well as women can "conceive a child."

> The CDC looked only at the devastating effects of lead on children and concluded that all exposures should be reduced. A study focussing on other subgroups in the population, such as males with high blood pressure or otherwise at risk of cardiovascular disease, would undoubtedly render a similar recommendation for that population. [Brief *Amici Curiae* in Support of Petitioners by American Public Health Association ("APHA Br.") at A-15].

Thus, CDC did not address, must less sanction, *discriminatory* exclusion of women from lead-exposed positions.[23]

c. Johnson Controls also argues for its vast expansion of the bfoq defense on the ground that employers are subject to a "legal duty to avoid injuries to the unborn that result directly from the toxic hazards of [their] own manufacturing operations." Resp. Br. at 27. This is true, but irrelevant.

An employer has a legal duty reasonably to protect from toxic or other hazards the qualified adult women and minorities the employer hires in compliance with Title VII. There is no privilege to avoid Title VII's (including the PDA's) equal employment requirements on the ground that the employer would rather exclude such individuals entirely than fulfill the duty to protect them from harm once hired.

Equally to the point, the fact that an employer has *a* legal duty to later-born children of employees says nothing about what that duty is. *None* of respondent's long list of citations is a case in which an employee's child has recovered against a non-negligent employer for

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[23] As to the EEOC, that agency's position on the scope of the bfoq as applied to fetal protection issues has varied broadly over the years, and there are currently two different, simultaneously operative, and directly contradictory EEOC documents on the question. *See* Pet. Br. at 27 n.26. Under these circumstances, the agency's views are hardly entitled to deference. Further, since the EEOC's position in *this* case is that Johnson Controls has *not* met the bfoq requirements, deference to the EEOC here would dictate reversal. *See* U.S. Br., *supra*.

prenatal or preconception injuries. Nor are the very narrow instances in which there can be strict liability despite reasonable warnings in any way analogous to those here. *See Prosser and Keeton on the Law of Torts* (5th ed. 1984) at 550-51.[24]

In the end, the tort question just discussed comes down to the policy issue whether employers *should* be free to exclude fertile women generally from employment because those women *may* conceive a child, and there *may* be some risk to such a possible child. That is basically the Title VII question before this Court, and one the Court is obliged to answer under the *express* terms of the federal equal employment opportunity law, not by speculating as to what common law courts might have done were Title VII not on the statute books.

CONCLUSION

For the reasons stated above and in our opening Brief, the judgment below should be reversed.

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[24] Respondent's contention that an adequate warning would not fulfill the employer's duty to an employee's potential fetus because "[i]n the products liability context, a warning is sufficient only if the product is otherwise 'safe for use if [the warning] is followed'" (Resp. Br. at 28 n.28), is another instance of selective, and gravely misleading, quotation of sources. The *very next comment* in the Restatement (Second) Torts to the one respondent cites is headed "[u]navoidably unsafe products" and states that "there are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . Such a product, property prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." *Id.* § 402A Comment j.

So that we are not misunderstood, we note that the question of what legal duty an employer owes to an employee's fetus has nothing to do with whether the mother can waive her child's cause of action if the child has one, or whether the mother's contributory negligence should be imputed to the child. Rather, it is our understanding that if the employer fully meets his duty (by reducing exposure to the degree reasonable and providing adequate warning to a person with responsibility for the child's health) then there is *no* cause of action to waive, and no negligence to contribute toward.

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No. 89-1215

IN THE

Supreme Court of The United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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August 3, 1990

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Johnson Controls respectfully calls to this Court's attention the decision and opinion of the United States Court of Appeals for the Sixth Circuit in *Grant* v. *General Motors Corp.*, ____ F.2d ____ (CA6 No. 89-3478, July 20, 1990). (Copies of the *Grant* slip opinion are being lodged with the Clerk's Office.) *Grant* was decided and filed one day after Johnson Controls' responsive brief was filed with this Court and therefore is a "late authorit[y] . . . that was not available in time to have been included" in Johnson Controls' earlier brief. See this Court's Rule 25.5.[1]

ARGUMENT

THE DECISION IN *GRANT* FURTHER UNDERMINES THE UAW'S ABSOLUTIST POSITION

With the decision in *Grant,* four courts of appeals, as well as the EEOC, have now rejected the UAW's position that Title VII categorically prohibits *all* fetal protection measures that distinguish among employees on the basis of their sex. See Brief for Respondent 16 n.23. Consistent with the other courts, the Sixth Circuit in *Grant* emphasizes that the inquiry under Title VII must "take[ ] into account the interests of all parties affected by fetal protection policies"—including unborn children—and that an employer does not violate the statute where it "establish[es] a factual basis for believing that its exclusionary policy is a necessary precondition to a safe and efficient workplace." Slip op., at 15.

Although the Sixth Circuit becomes the first court of appeals to reject the availability of a business necessity defense for gender-drawn fetal protection policies, see *id.*, at 14,[2] its opinion underscores the availability of the statutory BFOQ defense where an employer can show that such a policy is " 'reasonably necessary to the normal operation of [its] particular business or enterprise.' " *Ibid.* (quoting Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1)). Indeed, *Grant* points to the Seventh Circuit's *en banc*

[1]Johnson Controls' Rule 29.1 List and List of Parties are set forth in its July 19, 1990 Brief for Respondent.

[2]Compare the cases cited in Brief for Respondent 16 n.23.

majority opinion in the case at bar as "provid[ing] provocative insight into why the *Wright* court was incorrect in assuming that an employer necessarily would lose if forced to defend a fetal protection policy as a BFOQ." Slip op., at 12-13 (citing *Wright* v. *Olin Corp.*, 697 F.2d 1172 (CA4 1982)). Finally, the decision in *Grant* effectively rejects the UAW's suggestion in this case that the Pregnancy Discrimination Act somehow narrowed the contours of Title VII's BFOQ standard for classifications based on "pregnancy, childbirth, or related medical conditions." Title VII § 701(k), 42 U.S.C. § 2000e(k).[3]

Grant adopts a definition of the BFOQ standard based on Judge Cudahy's separate dissent below in this case, which in turn derives from *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (CA5 1969): "the employer must demonstrate 'a factual basis for believing that all or substantially all [excluded] women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved.' " Slip op., at 15 (quoting Pet. App. 60a n.1 (Cudahy, J.)). That definition only partially captures the scope of the BFOQ standard.[4] As previously shown, under this Court's precedents an employer also can establish a BFOQ where, as here, "it is 'impossible or highly impractical' to assess the safety risks on an individualized basis, *i.e.* to determine 'with

[3]The Sixth Circuit reviewed the legislative history and relevant precedents and concluded that "the PDA transforms distinctions based on pregnancy or potential pregnancy into overt sex discrimination violative of Title VII *absent a showing that pregnancy or potential pregnancy is a bona fide occupational qualification*." Slip op., at 8 (emphasis added). The opinion nowhere suggests that the PDA narrowed the BFOQ standard for evaluating such distinctions; to the contrary, it cites to non-PDA Title VII precedents as setting forth the relevant definition of the BFOQ in this context. *Id.*, at 14-16. Compare UAW Br. 31-33, 38-40.

[4]It is, however, consistent with precedents emphasizing that the BFOQ standard is not one of absolute certainty, but instead whether an employer has " 'reasonable cause to believe,' " also described as a "substantial basis for believing," that its challenged practice is necessary. *Dothard* v. *Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Weeks*, *supra*, at 235); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 422-423 (1985). See generally Brief for Respondent 38-40 & n.51.

sufficient reliability' which members of the group will risk damage to offspring if they remain in high-risk positions." Brief for Respondent 37 (quoting *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-415 (1985), and *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (CA5 1976) (internal quote to district court opinion omitted)). See also *Tamiami*, *supra*, at 235; U.S. and EEOC *Amici* Br. 22 & n.20.[5]

CONCLUSION

The judgment below should be affirmed.

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[5]We also note a factual distinction between the policy described in *Grant* and the one at issue here. Whereas the plaintiff in *Grant* was reassigned to a lower paying job pursuant to the fetal protection policy involved in that case, employees transferred under Johnson Controls' policy receive indefinite medical removal protection benefits to ensure they suffer no losses in pay, benefits, or seniority. Compare slip op., at 2, 11 n.14, 16-17, with Brief for Respondent 9-10 & n.14.

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No. 89-1215

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

JOHNSON CONTROLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in a Title VII challenge to a gender-based fetal protection policy, the bona fide occupational qualification defense, rather than the business necessity defense, is the appropriate standard for analyzing an employer's defense of such a policy.

2. Whether the bona fide occupational qualification defense may justify an employer's use of a gender-based fetal protection policy.

3. Whether the court of appeals correctly applied the bona fide occupational qualification defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1215

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

JOHNSON CONTROLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

This case presents important questions concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Both the Equal Employment Opportunity Commission (EEOC) and the Attorney General have significant enforcement responsibilities under the Act. The United States, as the nation's largest employer, is also subject to Title VII requirements.

STATEMENT

1. Since its purchase of Globe Union in 1978, respondent has been engaged in manufacturing batteries, a process which requires the use of lead as a primary ingredient. In 1977, in response to medical evidence of risks to unborn children, Globe Union adopted a fetal protection policy for lead exposure. Pet. App. 2a-5a. The policy statement noted that Globe Union had "stopped short of excluding women capable of bearing children from lead exposure," but it emphasized that "those women who

are working in lead exposure . . . and those women who wish to be considered for employment [should] be advised that there is risk, that we recommend *not* working in lead if they are considering a family, and further that we ask them to sign a statement that they have been advised of this risk." *Id.* at 5a.

Five years later, in 1982, respondent adopted the fetal protection policy at issue in this litigation; it shifted from a policy of warnings to a policy of exclusion.[1] Respondent announced its policy that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Pet. App. 9a. The policy defines women capable of bearing children as "[a]ll women except those whose inability to bear children is medically documented." *Id.* at 6a n.8. The policy further defines areas of lead exposure as areas in which (1) a current employee has recorded a blood level of lead exposure exceeding 30 micrograms per deciliter during the preceding year, or (2) the work site has yielded an air sample during the past year containing a lead level in excess of 30 micrograms per cubic meter. *Id.* at 5a. The policy permits employees in areas of lead exposure to keep their jobs if they are able to maintain certain blood lead levels (*id.* at 6a n.9); it contains no such option for new hires. Employees removed from a position because of excessive lead levels are transferred to another job without loss of pay or benefits (*id.* at 6a); the policy provides no similar compensation, however, for employees denied an opportunity to accept a job in a lead exposure environment.[2]

2. In April 1984, petitioners filed a class action challenging the fetal protection policy as sex discrimination in violation of

[1] Between 1979 and 1983, at least six of respondent's employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter, and one of the babies born to one of these employees was found to have an elevated blood lead level. Pet. App. 6a-7a.

[2] Respondent recently changed its policy in two respects. It eliminated the exclusion of fertile women from jobs which could lead to transfers to lead exposure jobs, and it lowered the level from 30 micrograms to 25 micrograms. Resp. Br. in Opp. 8 n.16. Both of these changes were adopted after the case was submitted to the court of appeals, and neither is in the record. *Ibid.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court certified a class consisting of past, present, and future production and maintenance employees in UAW bargaining units at nine of respondent's plants who have been and continue to be affected by respondent's fetal protection policy. Pet. App. 103a.

In January 1988, the district court granted respondent's motion for summary judgment. Applying a three-part business necessity defense derived from fetal protection cases in the Fourth and Eleventh Circuits, the court concluded that (1) although "there is a disagreement among the experts regarding the effect of lead on the fetus," the hazard to the fetus through exposure to lead was established by "a considerable body of opinion" (Pet. App. 113a-114a); (2) although "[e]xpert opinion has been provided which holds that lead also affects the reproductive abilities of men and women * * * [and] that these effects are as great as the effects of exposure of the fetus, * * * a great body of experts [is] of the opinion that the fetus is more vulnerable at levels of lead that would not affect adults" and "[m]en simply cannot expose a fetus to lead in the same way women can" (*id.* at 115a, 117a); and (3) petitioners had "failed to establish that there is an acceptable alternative policy which would protect the fetus." *Id.* at 116. The court also observed that, in view of this disposition of the business necessity defense, it did not "have to undertake a bona fide occupational qualification[ ] (BFOQ) analysis." *Id.* at 116a n.5.[3]

3. In September 1989, the Seventh Circuit affirmed in an en banc opinion.

a. The majority held that (1) the proper standard for evaluating the fetal protection policy was the business necessity defense; (2) respondent was entitled to summary judgment under the business necessity defense; and (3) even if the proper stan-

[3] The BFOQ defense provides, in pertinent part (42 U.S.C. 2000e-2(e)):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of [the employee's] religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

dard was a BFOQ, respondent was entitled to summary judgment. The court first reviewed the fetal protection opinions from the Fourth and Eleventh Circuits.[4] Those opinions established a three-step business necessity defense—whether there is a substantial health risk to the unborn child; whether transmission of the hazard to the unborn child occurs only through women; and whether there are no less discriminatory alternatives equally capable of preventing the health hazard to the fetus. Pet. App. 25a. The Seventh Circuit agreed that "the components of the business necessity defense the courts of appeals and EEOC have utilized in fetal protection cases balance the interests of the employer, the employee, and the unborn child in a manner consistent with Title VII." *Id.* at 27a-28a.[5] The court further noted that, under *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), the burden of persuasion always remains on the plaintiff in challenging a business necessity defense, and—unlike the Fourth and Eleventh Circuits—it thus imposed the burden on the plaintiffs for all three steps. Pet. App. 28a-31a. Cf. *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1549 (11th Cir. 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982).

[4] See *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). In *Wright*, the court treated a fetal protection policy as a policy with disparate impact, even though it explicitly applied only to fertile women; in *Hayes*, the court treated a fetal protection policy as a policy of disparate treatment, but permitted a prima facie case of facial discrimination to be rebutted by the elements of the business necessity defense established in *Wright*.

[5] In October 1988, while this case was pending on appeal, EEOC issued a policy statement in which it stated that "[a]lthough the BFOQ defense is normally the only one available in cases of overt discrimination, the Commission follows the lead of every court of appeals to have addressed the question * * * and concluded that the business necessity defense applies to these cases." *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) at 4, *reprinted in* Fair Empl. Prac. Manual (BNA) 405:6613, 6614-6615 [hereinafter *Policy Guidance*]. EEOC noted its view, however, that the district court in this case had incorrectly granted summary judgment for respondent. See *Policy Guidance* 9 n.22; Fair Empl. Prac. Manual (BNA) at 405:6618 n.22 ("[T]he district court purported to apply the *Hayes*/*Wright* analysis. It concluded, on summary judgment that the exclusionary policy was justified, despite the fact that, as we understand it, there was conflicting evidence about harm mediated through men. In the Commission's view, when conflicting evidence exists, summary judgment is not appropriate.").

Applying this business necessity defense, the court then concluded that (1) there was no genuine issue of material fact on the substantial health risk factor because the parties agreed that there was a substantial health risk to an unborn child from lead exposure; (2) unlike the evidence of risk to the unborn resulting from the mother's exposure, petitioners' evidence of risk to the unborn from a father's exposure was "speculative and unconvincing" (Pet. App. 34a); and (3) petitioners had waived the issue of less discriminatory alternatives by not adequately presenting it to the court of appeals. On the last point, the court also concluded that, in any event, petitioners had not produced evidence of less discriminatory alternatives in the district court. *Id.* at 32a-41a.

Having concluded that the business necessity defense was the appropriate framework and that respondent satisfied that standard, the court went on to discuss the BFOQ defense and concluded that respondent also met that test. Pet. App. 42a-59a. The en banc majority concluded that industrial safety is part of the essence of respondent's business, and that the fetal protection policy is reasonably necessary to further that concern. Quoting from *Dothard* v. *Rawlinson*, 433 U.S. 321, 335 (1977), the majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. Pet. App. 51a.

b. Judges Cudahy and Posner dissented and would have reversed and remanded for trial. Judge Cudahy explained that "[i]t may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try. * * * [T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking. However, the employer must demonstrate 'a factual basis for believing that all or substantially all women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved.' " Pet. App. 60a & n.1. He regarded a trial as necessary because "substantial factual questions remain concern-

ing whether occupational exposure to lead presents a substantial risk to the fetus, whether this risk is transmitted only through the pregnant woman and whether less restrictive alternatives would adequately safeguard the employer's interest in fetal health and safety." *Ibid.*

Judge Posner similarly emphasized that, under Title VII, a fetal protection policy which explicitly applies only to women can be defended only as a BFOQ. He also observed that Title VII defines the defense as a "bona fide occupational qualification reasonably necessary to the normal operation" of a business, and that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties." Pet. App. 62a, 65a. He emphasized, however, that whether a particular policy is lawful is a question of fact that should ordinarily be resolved at trial, and cited a variety of factual questions not susceptible to resolution on the current state of this record. *Id.* at 70a-74a. Like Judge Cudahy, he stressed that he viewed it "a mistake to suppose that we can decide this case once and for all on so meager a record." *Id* at 61a.

c. Judge Easterbrook, in a dissent joined by Judge Flaum, concluded that BFOQ is the proper mode of analysis, but that a fetal protection policy cannot be justified as a BFOQ. Judge Easterbrook noted that BFOQ is the appropriate framework because respondent explicitly "uses sex as a ground of decision." Pet. App. 75a. He then concluded that the BFOQ defense was not available because respondent's stated concern for the health of the unborn was irrelevant to the "operation of [its] business" under the BFOQ; similarly, he viewed the employer's concern as irrelevant to a woman's "ability or inability to work" under the Pregnancy Discrimination Act's amendment to Title VII. *Id.* at 81a.[6]

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[6] The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)) amended Title VII to provide, in pertinent part:

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work * * *.

Judge Easterbrook also stressed what he considered the excessive breadth of respondent's policy—it applies to all women (except those with medical proof of incapacity to bear children) despite the fact that most women in an industrial labor force do not become pregnant, that most of those who do become pregnant will have blood lead levels under 30 micrograms per deciliter, and that most of those who become pregnant with levels exceeding 30 micrograms per deciliter will nonetheless bear normal children. Pet. App. 83a-84a. As a result, "[c]oncerns about a tiny minority of women cannot set the standard by which all are judged." *Id.* at 84a.

Finally, Judge Easterbrook concluded that, if the business necessity defense rather than BFOQ is the governing standard, summary judgement was inappropriate, and the case should be remanded for trial. In an extensive discussion of the evidence, he found material factual disputes on all three of the factors addressed by the majority—whether there was a substantial risk to fetuses from lead in the mother's blood at the levels to which respondent exposes its employees (Pet. App. 88a-95a); whether harm to offspring comes only from exposure of the mother (*id.* at 95a-97a); and whether there were less discriminatory alternatives (*id.* at 97a-99a). He also emphasized that respondent's evidence was contradicted, not only by petitioners' evidence, but also by findings of the Occupational Safety and Health Administration (OHSA). In 1978, OSHA concluded that "both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy" and that "[g]iven the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." *Id.* at 93a (quoting 43 Fed. Reg. 52,966 (1978)).[7]

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[7] On January 24, 1990, EEOC issued a Policy Guidance on the en banc decision. The Commission modified its prior view that the business necessity defense could apply to a fetal protection policy. See note 5, *supra*. In its 1988 Policy Guidance, the Commission had emphasized that, consistent with the analysis in *Wright* and *Hayes*, the burden of proving business necessity was on the employer. *Policy Guidance* at 4-5 (1988); Fair Empl. Prac. Manual (BNA) at 405:6615. In its 1990 *Policy Guidance*, the Commission noted that it

SUMMARY OF ARGUMENT

1. Respondent's fetal protection policy explicitly excludes women from certain employment positions on the basis of their sex. The policy is not a facially neutral policy with a "disparate impact" on women. Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Rather, it is facially discriminatory, and thus represents overt discrimination and disparate treatment under Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a). See *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 (1977).

Such an explicitly discriminatory policy is not necessarily illegal under Title VII, but may be justified under that statute only if it is a "bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." § 703(e)(1), 42 U.S.C. 2000e-2(e)(1). The court of appeals incorrectly applied the business necessity defense developed in "disparate impact" cases, with its corresponding burden of persuasion on employees. *Wards Cove*, 109 S. Ct. at 2125-2126. The BFOQ defense is the appropriate standard for evaluating respondent's defense of such a facially discriminatory policy, and the burden rests on respondent to justify the policy

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had not contemplated "the Seventh Circuit's application of the *Wards Cove* business necessity standard" and the imposition of the burden on the plaintiff to disprove business necessity; "[f]or the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." Pet. App. 132a-133a. The Commission observed that the "application of *Wards Cove* to a facially discriminatory policy has convinced the Commission that the hybrid approach to fetal protection cases is problematic" and that "we now think BFOQ is the better approach." *Id.* at 134a. The Commission rejected the view, however, that the BFOQ defense is not available to defend a fetal protection policy, and set forth the elements which it believes should govern such a defense. The Commission also stated that, in its view, this case presented conflicting issues of material fact, quoting Judge Cudahy's statement that the "painful complexities are manifestly unsuited for summary judgment." *Id.* at 139a. The Commission emphasized that "Commission investigators should not overlook or dismiss conflicting evidence on the basis of the Seventh Circuit decision." *Ibid.* See also *Johnson Controls* v. *California FEHC*, 52 Fair Empl. Prac. Cas (BNA) 585 (Cal. Ct. App. 1990) (holding respondent's fetal protection policy invalid under state fair employment law).

as a valid BFOQ. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-415, 421-423 (1985).

2. It is possible that a bona fide occupational qualification defense can be used to sustain a sex-based fetal protection policy, but an employer defending such a policy must carry its burden of justification. The language of the BFOQ provision—"reasonably necessary to the normal operation of that particular business or enterprise"—is not in terms limited to concerns regarding an employee's effect on product quality. A concern with direct harm to third parties from the manufacturing process is "reasonably necessary to the normal operation of [a] business." Indeed, in other contexts, this Court has recognized the validity of safety-related concerns in applying BFOQ analysis. See, *e.g.*, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417; *Dothard* v. *Rawlinson*, 433 U.S. at 336. A contrary conclusion that a BFOQ defense could never consider harm to third parties from the manufacturing process would render invalid any gender-based fetal protection policy, and would mean that employers could not exclude *pregnant* women from particular kinds of employment, even if there was absolute certainty of harm to the fetus from exposure to a toxic substance in the course of employment.

To justify a gender-based fetal protection policy, however, an employer must prove with specificity that such a policy is "reasonably necessary." This Court has outlined the elements of a satisfactory showing by an employer that a facially discriminatory policy is a valid BFOQ. Under the standard explicated in *Criswell*, the employer must show that the claimed hazard from worker exposure is reasonably necessary to the normal operation of its business, and that the discriminatory policy is reasonably necessary to the operation of the particular business because it is a valid "proxy" for safety-related job qualifications and employment procedures. Thus, the employer must prove that the claimed hazard is genuine; that the substance or process causing the hazard is reasonably necessary to the employer's business; and that worker exposure to the substance or process causing the hazard is also reasonably necessary. Additionally, to establish that the policy of distinguishing among employees on the basis of sex is a valid "proxy" to address legitimate safety concerns, the employer must prove that exposure of male em-

ployees to the claimed hazard does not create a similar degree of risk to offspring; that all or substantially all of the excluded class cannot perform the job safely or that individualized consideration is impossible or highly impractical; and that there are no reasonably available, less discriminatory alternatives. Because the BFOQ is a limited exception to Title VII's general prohibition on sex-based classifications, careful judicial attention to factual findings and disputes is essential.

3. The court of appeals misapplied the elements of the BFOQ standard. The court failed to consider, under the BFOQ standard with the burden properly imposed on respondent, the evidence of possible harm to offspring from the exposure of male employees. Establishing that exposure of men does not pose a similar degree of risk as exposure of women is vitally important because, in the absence of such a showing, the exclusion of fertile women cannot be a valid method for serving the employer's asserted interest in preventing direct harm to third parties from the manufacturing process. In view of this error, and in view of the importance of careful attention to factual findings and disputes, the judgment should be reversed, and the case remanded to the court of appeals for reconsideration in light of a clarified standard.

ARGUMENT

I. THE ONLY AVAILABLE DEFENSE TO A SEX-BASED, FACIALLY DISCRIMINATORY EMPLOYMENT POLICY IS THE STATUTORY BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

A. The exclusion of fertile women from specified jobs constitutes sex-based discrimination

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) prohibits sex-based classifications in the terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions that adversely affect an employee's status.[8] Respondent's explicit policy of excluding

[8] Section 703(a) provides:

It shall be an unlawful employment practice for an employer –

"women with childbearing capacity" from lead-exposed jobs creates a facial classification based on gender. Respondent's policy is not a facially neutral policy that simply has a "disparate impact" on women. Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (disparate impact claim may be raised against "practices that are fair in form, but discriminatory in operation"); *Wards Cove*, 109 S. Ct. at 2118-2119 (same). Rather, it explicitly uses sex as the basis for its classification and exclusion. It is thus an overt form of "disparate treatment" because it "treats some people less favorably than others because of their * * * sex." *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). See also *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (requirement that female employees pay more than male employees to pension fund is facial discrimination because it "shows 'treatment of a person in a manner which but for that person's sex would be different' "); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 (1977) (exclusion of women as prison guards represents "overt discrimination").[9]

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[9] Because the policy by its terms discriminates on the basis of sex, there is no need to undertake the allocation of proof suggested by cases such as *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); the terms of the policy itself establish that sex, rather than a "legitimate, nondiscriminatory reason" (*McDonnell Douglas*, 411 U.S. at 802) is the criterion for exclusion. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (*McDonnell Douglas* test inapplicable because employer's policy "is discriminatory on its face"). See also Pet. App. 80a (Easterbrook, J., dissenting) ("Our case does not concern the order of proof and methods of inference; [respondent] expressly uses sex to make decisions."). The fact that the asserted reason for the sex-based exclusion (concern for the health of the fetus) may be benign does not prevent the policy from being sex-based discrimination. See pp. 13-14, *infra*.

The policy's classification on the basis of gender and childbearing capacity, rather than gender alone, unquestionably remains sex discrimination. As an initial matter, the policy is discriminatory because it requires only female employees to produce proof that they are not capable of reproducing. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (policy of excluding only women with pre-school-age children was sex discrimination because the policy established "one hiring policy for women and another for men—each having pre-school-age children"). Additionally, in the Pregnancy Discrimination Act (PDA), Congress explicitly provided that, for purposes of Title VII, discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." § 701(k), 42 U.S.C. 2000e(k). See note 6, *supra*. "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983). In its use of "childbearing capacity" as the criterion for exclusion, respondent explicitly classifies on the basis of potential for pregnancy; under the Pregnancy Discrimination Act, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. See Pet. App. 65a (Posner, J., dissenting); *id.* at 75a-76a (Easterbrook, Jr., dissenting).[10]

B. The only available defense to explicit, gender-based discrimination is the statutory BFOQ defense

The only statutory defense to explicit, facial discrimination under Title VII is the BFOQ defense in Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1). This statutory exemption provides that it

[10] The legislative history of the Pregnancy Discrimination Act contains repeated references to the problem of discrimination resulting from employers' perceptions that women may become pregnant. See, e.g., H.R. Rep. No. 948, 95th Cong., 2d Sess. 6-7 (1978) ("Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the childbearing age, she is viewed by employers as potentially pregnant."); 123 Cong. Rec. 21,435 (1978) (statement of sponsor Rep. Hawkins) ("many of the disadvantages imposed on women are predicated upon their capacity to become pregnant").

is not unlawful to use sex, religion, or national origin as a basis for employment decisions if that otherwise prohibited criterion "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). See note 3, *supra*. In decisions addressing the permissibility of explicit, sex-based discrimination, this Court has considered only the possible availability of the BFOQ defense. See *Dothard* v. *Rawlinson*, 433 U.S. at 332-337; *Phillips* v. *Martin Marietta Corp.*, 400 U.S. at 544. A conclusion that only the BFOQ defense is available to justify explicit, facial discrimination reflects the statutory structure: explicit, facial discrimination represents an unlawful employment practice under Section 703(a) of Title VII (note 8, *supra*), and may be justified only by the explicit statutory authorization provided in Section 703(e) (note 3, *supra*).

The business necessity defense, in contrast, developed not as a defense to explicit facial discrimination, but rather as an element to be considered in the context of a disparate *impact* claim. "Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of * * * a *disparate impact case*, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, 109 S. Ct. at 2125-2126 (emphasis added). See also *Griggs*, 401 U.S. at 431. This business necessity test has not, however, been employed in cases of disparate *treatment*.

Despite the explicit, facial discrimination in respondent's fetal protection policy, the court below concluded that the "business necessity defense" explicated in *Wards Cove* was the appropriate standard for evaluating the policy. Pet. App. 28a-30a. The court emphasized that this business necessity defense was appropriate because respondent's gender-based fetal protection policy was not instituted with the purpose of discriminating against women. See *id.* at 23a & n.25 (citing Fourth Circuit's conclusion that "a fetal protection policy involves motivations and consequences most closely resembling a disparate impact case" and noting that respondent's "primary interest in this case is

protecting the development and health of female employees and their unborn children").[11] The absence of a discriminatory motive, however, does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. The question whether an employment practice involves disparate treatment through explicit, facial discrimination does not depend on the nature of the employer's motive for adopting the practice, but rather on the explicit terms of the practice. In *Martin Marietta*, for instance, a possible benign motive did not prevent a conclusion that the exclusion of women with pre-school-age children constituted discrimination under Section 703(a), nor did it lead to consideration of a business necessity defense; the dispositive question became whether a BFOQ defense under Section 703(e) could justify the discrimination. 400 U.S. at 543. See also *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982) (discussing *Martin Marietta*). Similarly, in *Dothard*, the safety concerns underlying exclusion of women as prison guards did not prevent the policy from being sex discrimination under Section 703(a), nor did it lead to consideration of a business necessity defense; again, the question became whether the explicit, facial discrimination could be justified as a BFOQ under Section 703(e). 433 U.S. at 332-333. In sum, the beneficence of an employer's purpose does not undermine the conclusion that an explicitly gender-based policy is sex discrimination under Section 703(a), and may thus be defended only as a BFOQ under Section 703(e).

The Seventh Circuit's application of the business necessity doctrine rather than the statutory BFOQ defense to the facially discriminatory fetal protection policy has important consequences. The elements of the business necessity and BFOQ standards differ in significant respects. Compare, *e.g.*, *Wards Cove*, 109 S. Ct. at 2126 (standard for business necessity defense in disparate impact case) with *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412-417 (1985) (standard for BFOQ in context of age discrimination claim).[12] Most fundamentally, the burden of persuasion in the two standards is different. In *Wards Cove*, this Court explained that the burden of persuasion remains on the plaintiff at all times in a disparate impact/business necessity case. 109 S. Ct. at 2125-2126. Applying this standard here, the Seventh Circuit imposed the burden on petitioners. Pet. App. 32a-41a. The burden of establishing a BFOQ defense, in contrast, rests on the employer. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1789 (1989) (plurality opinion) (in BFOQ analysis, "it is the employer who must show why it must use gender as a criterion in employment"); *id.* at 1811 (Kennedy, J., dissenting) ("In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it."); *Dothard*, 433 U.S. at 332-337. See also *Crisweli*, 472 U.S. at 414-415, 422-423 (BFOQ burden of proof on employer under the ADEA).

The court of appeals thus erred in applying a business necessity defense to explicit facial discrimination and in imposing the burden on petitioners; the only appropriate defense to explicit facial discrimination under Title VII is a BFOQ defense, and the burden of establishing such a defense is on respondent.

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[11] See also *Wright*, 697 F.2d at 1186 (application of business necessity defense appropriate because of principle that "disproportionate consequences of an employment practice, even if unintended or indeed benignly motivated, may, like intentional invidiously discriminatory employer actions, constitute violations of Title VII"); *Hayes* 726 F.2d at 1548 (employer can show that gender-based fetal protection policy is "neutral" if "it effectively and equally protects the offspring of all employees").

[12] Similar standards govern the BFOQ provisions in Title VII and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417 (noting that, in adopting a BFOQ in the ADEA, Congress "borrow[ed] a concept and statutory language from Title VII of the Civil Rights Act of 1964" and approving BFOQ defense for ADEA derived from Title VII precedents). See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (Title VII interpretation "applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII' ") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)).

II. IT IS POSSIBLE FOR A SEX-BASED, FETAL PROTECTION POLICY TO BE JUSTIFIED AS A BFOQ

A. Nothing in the language or scope of the BFOQ provision precludes its use to defend a fetal protection policy

The BFOQ defense provides a limited exception to Title VII's prohibition of sex discrimination. As this Court explained in *Dothard*, "the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission" establish that "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." 433 U.S. at 334. See also 29 C.F.R. 1604.2(a) (EEOC Guidelines on Discrimination Because of Sex) (BFOQ should be narrowly interpreted).

Despite the narrow scope of the BFOQ exception, there is no legal or logical impediment to its application in this context. It cannot be doubted that a concern with industrial safety—and with the direct harm caused by a manufacturing process or product—is appropriately an essential element of business operations. A broad variety of societal sanctions—ranging from statutes and regulations to tort liability, and from administrative fines to criminal penalties—reflect the importance of this concern.[13]

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[13] See, *e.g.*, 15 U.S.C. 2601 *et seq.* (Toxic Substances Control Act); 29 U.S.C. 651 *et seq.* (Occupational Safety and Health Act of 1970); 42 U.S.C. 6901 *et seq.* (Resource Conservation and Recovery Act of 1976); 42 U.S.C. 6901 *et seq.* (Comprehensive Environmental Response, Compensation and Liability Act of 1980). See generally W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 4, 31, 75, 95 (5th ed. 1984); *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 505-506 (1986); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971); *Morissette* v. *United States*, 342 U.S. 246, 253-254 (1952); *United States* v. *Dotterweich*, 320 U.S. 277, 280 (1943).

Legally imposed concern for harm to third parties includes harm to fetuses. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *supra*, § 55 at 368 (every State currently allows children born alive to recover in tort for prenatal injuries inflicted by third parties); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 646 & n.24 (1981) (courts will hold unenforceable contracts between an employee and employer waiving an unborn child's cause of action against the employer). There has been no determination that federal or state law immunizes employers for injury to fetuses caused by workplace conditions, or that state tort liability for harm to fetuses is preempted by Title VII. Cf. *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (invalidating State's sex-specific protective labor legislation under Title VII). The existence of a reasonably perceived legal obligation is distinct from a justification resting solely on economic concerns (cf. *Manhart*, 435 U.S. at 716-717), or solely on moral concerns (cf. Pet. App. 82a (Easterbrook, J., dissenting)). It is not necessary in this case to consider whether the latter categories of concern, standing alone, might justify a BFOQ defense.

The statutory language of the BFOQ exception fully supports the conclusion that a concern with direct harm to third parties from a manufacturing process may be analyzed under the framework of the BFOQ. The statute provides that an employer may show that the challenged practice is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). A concern with direct harm to third parties from the manufacturing process fits comfortably within the scope of an element "reasonably necessary to the normal operation of [a] particular business or enterprise." As Judge Posner emphasized (Pet. App. 64a), the language of the statutory provision is not framed in absolutes; the BFOQ provision refers to a practice that is "reasonably necessary" (not absolutely necessary) and to the "normal operation" of the business (not an unusual or exceptional operation of the business). Nothing in the language or limited scope of the exception requires a view that a concern for direct harm to third parties from the manufacturing process must be deemed inherently incapable of being "reasonably necessary" to the "normal operation" of a business. On the contrary, the BFOQ exception reflects "Congress' unwillingness to require employers to change the very nature of their operations in response to the statute." *Price Waterhouse* v. *Hopkins*, 109 S. Ct. at 1786 (plurality opinion).[14]

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[14] We note that this case involves a claim of harm to third parties, not a claim that the policy is necessary to protect the women themselves. Cf. *Dothard*, 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

In our view, the contention that a BFOQ defense is absolutely unavailable for a sex-based fetal protection policy thus reflects a misreading of the BFOQ provision of Title VII. Judge Easterbrook suggests that, in this context, the BFOQ provision relates only to the "ability to make batteries." Pet. App. 81a. Because harm to a fetus does not affect a woman's ability to make a battery, the argument goes, the BFOQ defense is unavailable.[15] The problem with this analysis is that it requires an unduly restricted view of the BFOQ provision—one which is not supported by the language of the statute. Contrary to Judge Easterbrook's analysis, that language is not limited to concerns about an employee's effect on product quality. The language of the provision has a broader scope—it refers to a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Although a concern for direct harm to third parties from the manufacturing process may not relate to the effectiveness of an employee's job performance in the sense of effect on product quality, such a concern logically relates to the "normal operation" of a business.[16] Society can and does shut down businesses that inflict harm on third parties thro[u]gh their operations; a concern with the safety of third partie[s] thus unquestionably "reasonably necessary to the normal operation of [a] particular business or enterprise."

The importance of safety to third parties, moreover, has been recognized as an appropriate element of the BFOQ analysis in

[15] The Fourth and Eleventh Circuits also assumed that the BFOQ analysis would be unavailable to defend a sex-based fetal protection policy. See *Wright*, 697 F.2d at 1185 n.21; *Hayes*, 726 F.2d at 1549.

[16] See Pet. App. 60a n.1 (Cudahy, J., dissenting) ("[T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking."); *id.* at 64a (Posner, J., dissenting) ("The words " '*normal* operation' * * * should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured if the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal.").

prior decisions. In *Dothard* v. *Rawlinson*, *supra*, for instance, this Court upheld, as a BFOQ, the exclusion of women as security guards in a particularly violent, all-male maximum security prison, in part because "[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." 433 U.S. at 336. Similarly, in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417, this Court upheld consideration of safety to passengers as an element in the BFOQ analysis of an age limit on flight engineers. According to Judge Easterbrook's analysis, a case such as *Criswell* can be distinguished because the concern about the safety to passengers is related to the individual's ability to "do the job." Pet. App. 85a. Again, however, there is no persuasive reason, under the explicit language of the BFOQ provision, why the concern for injuries to third parties may not include a concern for injuries to third parties resulting directly from the manufacturing process as an aspect of the "normal operation" of the business. Judge Easterbrook observes that respondent "is not using sex to avert harm *to customers*" (*ibid.* (emphasis added)), but he fails to point to language in the BFOQ provision suggesting that "normal operation of business" concerns may only be customer-directed.

In addition to lacking support in the statutory language and logical scope of the provision, the view that the BFOQ defense is completely unavailable for a sex-based fetal protection policy leads to harsh and incongruous results. A necessary consequence of that view is that, even if there is absolute certainty that a *pregnant* woman's exposure to a hazardous substance would unalterably injure the fetus, an employer is barred by Title VII from adopting a policy of exclusion focused only on pregnant women. The difference between the exclusion of fertile women and the exclusion of pregnant women is a question of the scope of the policy; if the BFOQ defense is unavailable at all to defend a sex-based fetal protection policy, then it is equally unavailable, under Title VII as amended by the Pregnancy Discrimination Act, to defend a policy directed only at pregnant

women.[17] Nothing in the language or purpose of the BFOQ requires this result.[18]

B. An employer bears a rigorous burden in justifying use of a sex-based, fetal protection policy

The standards for the BFOQ defense in the context of a fetal protection policy can be readily derived from this Court's explication of the BFOQ standard in other contexts. Application of the standards in this context suggests that the employer's burden is exacting, and that the defense must be supported by specific factual showings.

As an initial matter, and as has been discussed, it is critically important that the employer bear the burden of proof in establishing this BFOQ defense. The BFOQ defense is a limited exception provided by Title VII to its general prohibition of sex-

[17] Cf. Pet. App. 64a (Posner, J., dissenting) ("To confine the occupational qualification defense to concerns with price and product quality would deny a defense to [respondent] even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries.").

[18] Because a BFOQ defense under Section 703(e) can include concern for harm to third parties from direct exposure to the manufacturing process, moreover, Judge Easterbrook's Pregnancy Discrimination Act (§ 701(k)) objection (Pet. App. 82a, 85a) is also met. The structure and language of Section 701(k) – including its definition of pregnancy-based discrimination as sex discrimination for purposes of Title VII and its provision that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work" – require that pregnancy-based discrimination be treated like other forms of sex discrimination in Title VII; like other forms of sex discrimination, pregnancy-based discrimination is thus subject to the general BFOQ defense. Nothing in Section 701(k) suggests a special exemption from Section 703(e); indeed, the language of the provision suggests exactly the contrary because, within the context of Title VII, it puts pregnancy-based discrimination on the same footing as other forms of sex discrimination. The applicability of Section 703(e) to pregnancy as a form of sex discrimination within the context of Title VII's provisions is, of course, distinct from the issue of the permissibility of state statutes according special benefits to pregnancy. Cf. *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987) (upholding state law pregnancy leave provision).

based discrimination, and, as such, the burden must be borne by the employer asserting the exception. See pp. 14-15, *supra*.

The statute provides a defense to an employer who shows that its facially discriminatory policy is "a bona fide occupational qualification reasonably necessary to the normal operation of [its] particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). In the context of a safety-related BFOQ defense to a claim of age discrimination from the exclusion of flight engineers over the age of 60, this Court in *Criswell* parsed this language as posing two basic inquiries: (1) whether the objective served by the policy is "reasonably *necessary* to the normal operation of the particular business," as opposed to being "peripheral to the central mission of the employer's business," [19] and (2) whether the discriminatory aspect of the qualification is itself reasonably necessary, as opposed to being merely "convenient" or "reasonable" – *i.e.*, is the employer "compelled to rely on [the discriminatory factor] as a proxy for the safety-related job qualifications validated in the first inquiry." 472 U.S. at 413-414. This "proxy" factor, in turn, could be established if the employer proved either that it had a factual basis for believing that "all or substantially all [persons in the excluded category] would be unable to perform safely and efficiently the duties of the job involved" or that "it is impossible or highly impractical to deal with the [excluded] employees on an individualized basis." *Id.* at 414 (internal quotation marks omitted).

This standard should be applied to the context of fetal protection policies. First, the employer must establish that avoidance of the claimed hazard is "reasonably *necessary* to the normal operation of the particular business." *Criswell*, 472 U.S. at 413.

[19] The Court in *Criswell* also quoted the Fifth Circuit's statement in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976), that the qualification invoked by the employer "must be *reasonably necessary* to the essence of his business." 472 U.S. at 413 (emphasis in Fifth Circuit opinion). The *Criswell* Court further noted the Fifth Circuit's decision in *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, cert. denied, 404 U.S. 950 (1971), holding that a female-only qualification for flight attendants, defended on the grounds that "the airline's passengers preferred the 'pleasant environment' and the 'cosmetic effect' provided by female attendants," was not a valid BFOQ because it was " 'tangential to the essence of the business involved.' " 472 U.S. at 413 n.18.

In this context, the employer thus must establish that the claimed hazard is, in fact, a genuine hazard—that worker exposure to the claimed hazard leads to a substantial risk of injury to the fetus. The employer must also establish that the substance or process causing the claimed hazard is itself reasonably necessary to the normal operation of its business. Finally, the employer must establish that exposure to the claimed hazard is also reasonably necessary to the normal operation of its business.

Second, the employer must establish that the policy is reasonably necessary to the particular business because the employer is compelled to rely on the discriminatory criterion as a "proxy" for safety-related qualifications and procedures that would avoid the claimed hazard. As an initial matter, it is essential that the employer establish that the exposure of male employees to the claimed hazard does not present a similar degree of risk of harm to offspring; if exposure of men does lead to a similar degree of risk, the exclusion of women cannot be a valid "proxy" for addressing the asserted safety concerns. As in *Criswell*, the employer must also establish either that "all or substantially all" of the excluded group cannot perform the job without jeopardizing the safety of the fetus, or that it is "impossible or highly impractical" to assess safety on an individualized basis.[20] Finally, the employer must prove that the policy it has adopted eliminates the risk while excluding the narrowest possible group of employees, and that there are no reasonably available, less discriminatory alternatives.

These particularized inquiries are essential to assure that fetal protection policies are narrowly tailored to accomplish legitimate goals without sacrificing the rights of individuals to be free from discrimination. "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. * * * Even a true generalization about the class is an insufficient rea-

[20] It is likely that, in justifying fetal protection policies, the impossibility-of-individual-assessment claim will be more pertinent than the all-or-substantially-all-cannot-perform claim. Unless the employer has a factual basis for believing that (1) all or substantially all of the excluded women will bear children and (2) harm will be transmitted to the fetus through all or substantially all of the excluded women, the all-or-substantially-all claim will be unavailing.

son for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978). "Practices that classify employees in terms of religion, race, or sex, tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 709. To assure that an exclusionary policy is accepted only with a rigorous justification, and to assure that the narrowest possible group is affected by such an exclusionary policy, an employer thus must prove the specific correlation between the identified hazard and the basis for exclusion.

As a result, the importance of careful factual findings must also be emphasized. Title VII cases are, of course, subject to the same rules of procedure and practice as other areas of civil litigation. *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983); *id.* at 718 (Blackmun, J., concurring). Nevertheless, the emphasis which Judges Cudahy and Posner placed on the importance of factual findings in this area (and the emphasis which Judge Easterbrook placed on the importance of factual findings in his alternative argument (Pet. App. 88a-99a)) is entirely appropriate. The BFOQ analysis of sex-based, fetal protection policies is a "novel and difficult" area in which "careful examination of the facts as developed by the full adversary process of a trial" is likely to be particularly important. Pet. App. 73a (Posner, J., dissenting). This emphasis on the importance of factual findings is fully consistent with concerns expressed by this Court in other BFOQ cases. See, *e.g.*, *Criswell*, 472 U.S. at 423 (employer's argument concerning its experts' conclusions "virtually ignores the function of the trier of fact in evaluating conflicting testimony"); *Johnson* v. *Mayor & City Council of Baltimore*, 472 U.S. 353, 362 (1985) (BFOQ in age discrimination context requires a "particularized, factual showing"); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (employer's BFOQ justification was a "matter of evidence" and "[s]ummary judgment was therefore improper"). Such concerns are particularly salient in the sensitive area of fetal protection policies.

III. THE COURT OF APPEALS MISAPPLIED THE BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

Although the court of appeals upheld respondent's gender-based fetal protection policy on the alternative ground that it satisfied the BFOQ standard (Pet. App. 42a-59a), the court misapplied the elements of that defense. The most glaring error—and an error of sufficient magnitude to require reversal—is that the court of appeals failed to consider, under the BFOQ standard and with the burden on respondent, petitioners' evidence of harm to offspring from the exposure of males.[21] As has been discussed, a showing that a similar degree of risk is not created by the exposure of men is central to an employer's BFOQ defense, and to the validity of the use of the sex-based criterion as a proxy for individualized consideration.[22]

The court of appeals did consider petitioners' proffered evidence regarding the effects of exposure of men, but it did so only in the context of its principal holding that petitioners had failed to carry *their* burden with regard to the business necessity defense. Pet. App. 33a-36a.[23] The court first noted that respondent's experts "testified that a male worker's exposure to lead at levels within the 50 [microgram/deciliter] maximum set forth in OSHA's current (1978) lead exposure guidelines did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." Pet. App. 33a. The court then observed that petitioners' witnesses "posited that animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure" (*id.* at 33a-34a), but that petitioners had not "presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure" (*ibid.*), and that their experts' research was "at best, speculative and unconvincing." *Ibid.*

In rejecting the significance of petitioners' evidence, the court repeatedly emphasized that, under its application of "the Title VII disparate impact/business necessity proof scheme" (Pet. App. 34a), petitioners bore the burden of persuasion. *Id.* at 29a, 31a, 34a-35a. The court thus mistakenly considered the evidence of exposure to men under the business necessity defense, with the burden placed on petitioners.[24]

In its alternative holding that respondent had satisfied the BFOQ, the court then failed to consider, under that standard

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[21] We note that the dissenting Judges concluded that, in addition to conflicting evidence regarding the consequences from the exposure of men, the record also contains material conflicts and gaps regarding the nature of the risk to the fetus and the possibility of less discriminatory alternatives, including improved warnings, alternative employment opportunities, individualized monitoring, and increased emphasis on industrial hygiene, employee education, and respirators. See Pet. App. 60a n.1 (Cudahy, J., dissenting); *id.* at 70a-73a (Posner, J., dissenting); *id.* at 88a-95a, 97a-99a (Easterbrook, J., dissenting). We take no position on whether these issues have been properly presented or preserved in this litigation or in the petition (cf. Resp. in Opp. 19-25; Pet. Reply Br. 3-9), but we emphasize that these are precisely the kinds of issues which are vitally important for evaluating the validity of a gender-based fetal protection policy, and which require careful, precise factual findings. See pp. 22-23, *supra*.

We note also that OSHA concluded in promulgating its occupational lead exposure standard in 1978 that, in light of the evidence before it, there was "no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52,966. Instead, OSHA emphasized the use of various protective measures. *Id.* at 54,423. OSHA's 1978 conclusions, while not dispositive of the issues in this case, nevertheless represent important evidence in this type of litigation.

[22] It would, of course, not invalidate respondent's policy if exposure of men to lead created some risk to offspring, but the risk was substantially more attenuated than the risk posed by exposure of women to the same hazard.

[23] Petitioners had submitted evidence in support of their argument that exposure of men to lead also created potential hazards for offspring. See Pet. App. 95a (Easterbrook, J., dissenting) ("Three affidavits in the record, and papers in medical journals, maintain that lead in the blood creates risks for offspring of both male and female employees."). See also J.A. 261 (Silverstein Aff.) ("On the basis of the animal and human data, damage to the male can include malformed and dysfunctional sperm, chromosomal damage and aberrations and testicular damage. Defects in reproductive functions that are associated with lead exposure include fetal death * * *, sterility, low birth weight, birth defects as well as developmental abnormalities in offspring. Some of these risks can be associated with blood lead levels in males and females as low as 20 micrograms * * *"); J.A. 249 (Legator Dep.) ("There are very few chemicals that we know of * * * where there is evidence that would indicate the exposure to the male has an effect on spermatogenesis which can then be transmitted to the progeny * * * and lead falls into this group that has an effect as far as we now know from the literature, on spermatogenesis.").

[24] To the extent that the court of appeals' decision may be read as holding that animal studies are never probative (Pet. App. 34a), we disagree. The reliance on well-conducted animal studies in establishing mandatory health standards, and by analogy in evaluating the validity of exclusionary fetal protection policies, is proper. See *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607, 657 n.64 (1980) (plurality opinion); *Public Citizen Health Research Group* v. *Tyson*, 796 F.2d 1479, 1488-1489, 1496-1497 (D.C. Cir. 1986).

and with its imposition of the burden on respondent, the evidence of the consequences from the exposure of men. Although the court appeared to recognize that the burden of establishing the BFOQ was on respondent (Pet. App. 52a-53a, 58a-59a), the court discussed only evidence that (1) exposure of *pregnant* women created a risk to fetuses (*id.* at 53a); (2) exposure of *fertile* women created a risk to fetuses (*ibid.*); (3) respondent's use of a 30 micrograms per deciliter level of lead in the blood was appropriate (*id.* at 54a); and (4) there had not been a "convincing exposition in the record of any suitable alternative" (*id* at 58a). The court simply failed to consider, under the BFOQ standard with its reallocation of the burden, the evidence concerning harm from the exposure of males.[25] This element, however, is an essential element of an employer's burden in justifying a BFOQ defense, and the court of appeals' failure to consider that evidence in light of that burden represents a fundamental error in its analysis.

Because the court of appeals failed to consider this critical element of the BFOQ defense with the burden placed on respondent to justify its policy, and because the nature of the BFOQ defense in this area requires careful attention to precise factual findings and disputes, the case should be remanded to the court of appeals for further consideration in light of a clarified standard for evaluating the defense of a sex-based fetal protection policy.

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[25] At the outset of its BFOQ discussion, the court made one reference, in the context of discussing the nature of respondent's business, to the harm posed to "the offspring of female employees." Pet. App. 48a. In light of the dispute regarding evidence of harm from exposure of males – and in light of the importance of that dispute – this conclusory reference to the "offspring of female employees" cannot substitute for a considered analysis of the evidence of effects from the exposure of men, with the burden placed properly on respondent, rather than on petitioners. Nor can the court's reference to the lack of available alternatives (*id.* at 58a) be construed as encompassing a consideration of the evidence relating to exposure of men with the burden properly on the employer; in its business necessity defense analysis (with the burden on the petitioners), the court explicitly considered the evidence of exposure of men and the possibility of less restrictive alternatives as distinct subjects. Compare *id.* at 33a-36a with *id.* at 36a-41a.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

—v.—

JOHNSON CONTROLS, INC.,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WISCONSIN; AMALGAMATED CLOTHING & TEXTILE WORKERS UNION; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF LAW & MEDICINE; CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY & HEALTH; COALITION OF LABOR UNION WOMEN; COMMITTEE FOR RESPONSIBLE GENETICS; COMMUNICATION WORKERS OF AMERICA; EMPLOYMENT LAW CENTER; ENVIRONMENTAL DEFENSE FUND; INTERNATIONAL CHEMICAL WORKERS UNION; MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY & HEALTH (MASSCOSH); NATIONAL ABORTION RIGHTS ACTION LEAGUE; 9 TO 5 NATIONAL ASSOCIATION OF WORKING WOMEN;

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted pursuant to Rule 37.2 of the Rules of this Court and is filed in support of Petitioners.[1/]

Amici are organizations and individuals concerned about the pervasive policies of employers such as Johnson Controls which exclude virtually all women from jobs involving alleged hazard to a potential fetus. Amici have significant expertise that may assist the Court in this case. Specifically, both individually and collectively, amici are knowledgeable about the nature and extent of sex-based exclusionary practices nationwide, and

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1/ The Parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 37.2 of the Rules of this Court.

their effects on the employment rights and health status of all workers.[2/]

INTRODUCTION

The majority of an en banc panel of the Seventh Circuit has concluded, over the vigorous dissents of four of its members (Judges Cudahy, Easterbrook, Flaum and Posner), that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., as amended ("Title VII"), does not prohibit an employment policy that restricts opportunities for women who are willing and able to work, because of the chance that they may become pregnant and that a workplace hazard may harm the fetus. In a radical departure from Title VII law, the court below further concluded that the victims of discrimination bear the burden of proving the policy's invalidity.

The court was asked to review a grant of summary judgment, on a limited record containing material disputes about the employer's evaluation of the risks of employment. Instead of applying the statute as written or remanding for further factual development, the court discredited the plaintiffs' evidence demonstrating that the policy is scientifically insupportable and held that they had not met the newly-imposed burden of proof.

Review by this Court is necessary to clarify the application of Title VII to such sex-based policies, since the courts of appeals have adopted divergent positions. With regard to burden of proof, the Seventh Circuit's holding conflicts with those of the Fourth and Eleventh Circuits

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2/ Individual statements of interest for the amici are set forth in an Appendix to this brief.

and is inconsistent with recent decisions of this Court. Finally, although the court below has placed risk assessment at issue, it has limited the scope of the inquiry in a manner that is at odds with scientific principles and conclusions.

The implications of the case for women's employment rights under Title VII are manifest. Less apparent, but equally significant, are its ramifications for the overall assessment and management of work-place health hazards and for the way in which private dispute resolution affects the development of public health policy.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE.

On a record described by Judge Posner in dissent as a "tissue of speculation," Pet.App.72a, the Seventh Circuit has concluded that an employer who plainly

restricts the employment rights of women[3] did not violate Title VII's prohibition on discrimination in employment, because the workers themselves did not prove that the employer's policy was invalid.[4] Instead, the court openly deferred to the employer's decision that it was better for women as a

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3/ Johnson Controls' policy has a "striking sweep." Pet.App. 97a (Easterbrook, J., dissenting). All women are required to disclose whether they are fertile or sterile. No woman physically capable of conceiving will be placed in a job in which any employee has had a blood lead level exceeding 30ug/dl anytime during the past year or in any job that might lead to a promotion to such a job. "As a practical matter, this means every industrial job at Johnson's battery plants. The firm advised its hiring offices to tell women that 'we have no openings for women capable of bearing children.'" Id.

4/ Under Title VII, the employer has always borne the burden of proof to justify a demonstrably discriminatory policy. E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977). That rule has been altered in cases involving disparate impact, but not in those involving intentional discrimination. Compare Wards Cove Packing Co. v. Atonio., ___ U.S. ___, 109 S.Ct. 2115 (1989) with Price-Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989) (mixed motive). Notwithstanding its questionable relevance, the court below retroactively applied Wards Cove to this case.

class to be sterilized, unemployed, or underemployed, than to risk exposing even a potential fetus to workplace hazards. By requiring courts applying Title VII to ignore the statutory language and instead to "unravel medical mysteries," Pet.App.90a (Easterbrook, J., dissenting), the decision below threatens both millions of working women and their families and the development of rational occupational health care policies. Judge Easterbrook's comment that this "is likely the most important sex discrimination case in any court since ... Congress enacted Title VII," Pet.App.99a, is no exaggeration.

A. The Case Is Of Critical Importance To Working Women And Their Families.

It has been estimated that as many as 20 million women could be affected if policies like Johnson Controls are permissible under Title VII.[5/] Numerous large corporations are known to have similar practices,[6/] and it is believed that such policies are even more pervasive. For example, in the only known attempt to document the prevalence of such practices, the Massachusetts Department of Public Health and the University of Massachusetts Occupational Health Program conducted a study of chemical and manufacturing firms

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5/ Pet.App. 87a (Easterbrook, J., dissenting); id. at 73a (Posner, J. dissenting) ("jobs of millions of women" at stake); EEOC Proposed Rulemaking: Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980) ("as many as 20 million jobs may involve exposure in the workplace to alleged reproductive hazards") (proposed guidelines withdrawn, 46 Fed. Reg. 3916 (Jan. 16, 1981)); U.S. Department of Health and Human Services, 34 Morbidity and Mortality Weekly Report 537, 538 (Sept. 6, 1985) (estimating approximately 15 million workers "exposed to selected agents known or suspected to be toxic to reproductive function"). See also Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1225-27 (1986) (hereinafter, "Becker").

6/ Becker, supra note 5, at 1240 n.103.

in that state. Responses were voluntary. Nearly 20% of responding companies restricted women allegedly because of concern for fetal health, even though both sexes faced similar reproductive risks.[7/]

Workplace restrictions are most oppressive and extreme in occupations traditionally characterized by entrenched gender-based segregation.[8/] Johnson Controls' policy, effectively excluding women from all employment in its battery plants, is typical of restrictions in the traditionally male, petro-chemical industry where wages are high and women are per-

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7/ Paul, et al., Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am. J. Occ. Med. 267 (1989).

8/ See Becker, supra note 5, at 1237-41.

ceived as marginal workers.[9/] In these jobs, open only recently to women,[10/] sterility has become a term and condition of employment. Indeed, Mary Craig, one of the plaintiffs in this case, submitted to surgical sterilization because she believed that was "the only way [she] would be guaranteed continued employment." Complaint at ¶79(f).[11/]

9/ For example, the policy adopted by the Olin Corporation in 1978 excluded women from five of eleven lines of progression in one division and some jobs elsewhere. Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982). General Motors' policy "virtually forecloses the employment of women altogether" at its battery plants. Scott, "Keeping Women in their Place", in Double Exposure 180, 181 (Chavkin, ed. 1984). And see Grant v. General Motors, appeal filed (6th Cir., No. 89 - 3478).

10/ See, e.g., Becker, supra note 5, at 1239 n.100.

11/ At American Cyanamid's Willow Island, West Virginia plant, women were initially told they would be excluded from most production jobs if they were fertile. The policy was subsequently narrowed, but only after five women submitted to

(continued...)

Restrictive policies may be less extreme in other industries, but they nonetheless severely limit women's employment opportunities. Both Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) and Zuniga v. Kleberg County Hospital, 692 F.2d 986 (5th Cir. 1982), involved x-ray technicians who were fired when they became pregnant, even though both were well within universally accepted safety limits for pregnant women.[12/] Since virtually no activity is risk-free, deference to an employer's analysis of fetal risk could limit women's

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11/ (...continued)
sterilization. Oil, Chemical & Atomic Workers Internat'l Union v. American Cyanamid Co., 741 F.2d 444, 445-46 (D.C. Cir. 1984).

12/ AT&T has also barred pregnant women from jobs at computer chip processing plants because of unconfirmed reports of reproductive hazards. Bureau of National Affairs, Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety (1987) at 66.

participation in nearly every area of economic life:

> A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses? For all we can tell, Johnson's argument compels us to answer "yes" to these questions ....

Pet.App.92a (Easterbrook, J. dissenting). Accord, Hayes, 726 F.2d at 1553 n.15.

"[L]ike other controversies of great potential consequence, [this case] demands ... some insight into social reality." Pet.App.61a (Cudahy, J., dissenting). Clearly, for those women whose jobs are at stake, and for their families, restrictive policies, whatever their form, present issues of economic urgency. Judge Coffey's suggestion that women are balancing mere

"financial reward" against the health of their future children, Pet.App.21a, is simply a distortion. The truth is that most women work because they have to; whether in single parent or in two wage-earner households, women's contributions to family income are critical.[13/] Johnson Controls' policy and others like it thus require women to make an impossible choice, between their fertility and their jobs.

These social and economic realities were recognized by Congress more than a decade ago when it specifically prohibited discrimination based on pregnancy:

> The loss of a mother's salary will have a serious effect on the family unit, making it difficult for parents to provide their

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13/ For example, sixty percent of women in the labor force are single, divorced, widowed, or are married to men earning less than $15,000 per year. Women's Bureau, Office of the Secretary, U.S. Department of Labor, Fact Sheet No. 88-2, Facts on Women Workers, ¶9 (1988).

> children with proper nutrition and health care. For some women and their families, it will mean dissipating family savings and security, or being forced to go on welfare.[14/]

Policies restricting women's employment, even if well-intentioned,[15/] have negative health effects. Studies have

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14/ Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1979) at 3 (statement of Senator Williams) (hereinafter "Legis. Hist.").

15/ Johnson asserts a vague "moral" concern for fetuses, but this assertion lacks credibility. As Judge Easterbrook noted, it did not consider the negative effects its policy might have on fetuses. Pet. App. 94a. Nor did it consider either the impact of the policy on current children of female workers or the full range of other serious health effects on adults. See pp. 21-25, infra. The extent to which potential tort liability may have motivated Johnson Controls is unknown on the limited record available. While suits by offspring of both male and female workers are possible, there is no evidence that employers are likely to face significant liability only from children of female workers. See Becker, supra note 5, at 1245. Johnson may have declined to offer this justification because Title VII does not recognize a cost-based defense. E.g., Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702 (1978).

shown a full range of adverse social and health effects associated with both unemployment and low wage wor. 16/ In particular, poverty and the lack of adequate prenatal care are strongly correlated with low birth weight and prematurity, the causes of most infant morbidity and mortality in the United States.17/ Thus, Judge Easterbrook noted, "Surely Title VII does not allow an employer to adopt a policy that simultaneously makes both women and their children worse off." Pet.App.95a.

As a final matter, although Johnson Controls' policy treats all women as if they will become pregnant, in fact the average woman in this country bears only two children, and working women in particular carefully time and plan their pregnancies.18/ The decision below would exclude most women from Title VII's coverage, allegedly to safeguard their reproductive functions.19/ Others would pay a heavy price, in the loss of procre-

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16/ House and Senate Joint Economic Comm., Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong., 2d Sess. 3 (1984). See also Becker, supra note 5, at 1230-31, 1243.

17/ See, Binsacca et al., Factors Associated with Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also U.S. House of Representatives, Select Comm. on Children, Youth and Families, Caring for New Mothers: Pressing Problems, New Solutions, A Fact Sheet and Hearing Summary, (unpublished) (Oct. 24, 1989).

18/ Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-20, No. 427, Fertility of American Women: June 1987 at 9 (1988); Bureau of the Census, U.S. Department of Commerce, Special Demographic Analyses, CDS-80-8, American Women: Three Decades of Change at 8 (1983).

19/ Muller v. Oregon, 208 U.S. 412 (1908), is instructive in revealing how women have historically been restrained by law in ways that promote their childbearing activities and require them to discharge maternal functions in specific ways.

ative freedom, to secure their statutory rights.

B. This Case Is Important To The Development Of Rational Workplace Health Policy.

Under a literal reading of Title VII, as amended by the Pregnancy Discrimination Act ("PDA") 42 U.S.C.§2000e(k), the sole issue for judicial determination in a case challenging a sex/pregnancy-based policy is whether affected women are being treated the same for all employment related purposes as others "similar in their ability or inability to work"?

Nonetheless, the court below ignored the plain language of the statute and adopted an approach which required examination of the scientific validity of Johnson Controls' policy. See generally, Section II, infra. It determined that, in the occupational context, employers are to

be given wide discretion in making risk decisions, Pet.App.49a, even when their policies discriminate, and that the burden of persuasion falls on the victim to prove that such policies are invalid. See infra, note 34.

The rule in the Seventh Circuit thus requires women workers to bear the burden of scientific uncertainty. Other circuits have adopted a different rule. In both the Fourth and Eleventh Circuits, the burden of uncertainty is borne by the employer who must prove the scientific validity and necessity of such a policy.20/ As a

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20/ Specifically, the Seventh Circuit would require workers to disprove, inter alia, (1) that there is a substantial health risk to "the unborn child" and (2) that "transmission of the hazard ... occurs only through women." Pet.App. 25a. In contrast, the Fourth and Eleventh Circuits place the burden on the employer to show "that the body of opinion believing that significant risk [to a fetus] exists is so considerable that, 'an informed employer could not responsibly fail to act on the

(continued...)

practical matter, the allocation of this burden is outcome determinative. Practices that would be defensible under the Seventh Circuit's approach would likely fail to withstand scrutiny under the analysis adopted by the other two circuits.

Inconsistency, however, is only part of the problem. The decision below reveals how litigation focusing on a specific risk may undermine public health goals by failing to take into account the complex process by which public risks are appropriately identified, evaluated, and managed:

> Risk assessment [is]comprised of some or all of the following components: hazard identification, dose-response assessment, exposure assessment, and risk characterization.... [R]isk management combines the risk assessment...with socioeconomic, technical, political, and other considerations, to reach a decision as to whether to control future exposure...and, if so, the level of control.21/

The decision below failed to address some crucial issues of risk assessment and risk management, and as to others, made critical interpretive errors. As a result, its conclusions are at odds with those reached by other courts and public health officials.22/ Specifically, its approach

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20/ (...continued)
assumption that this opinion might be the accurate one.'" Hayes, 726 F.2d at 1548 (citing Wright, 697 F.2d at 1191). The employer's proof that the hazard does not affect male reproductive function must be of similar quality. Id. Evidence that the employer selectively protects against fetal risk would indicate pretext. Id. at 1547-8 n.5.

21/ EPA Proposed Amendments to the Guidelines for the Health Assessment of Suspect Developmental Toxicants, 54 Fed. Reg. 9386, 9389 (proposed Mar. 6, 1989) (hereafter, "Proposed Guidelines for Developmental Toxicants").

22/ These problems are, to some extent, inherent in litigation, which ordinarily focuses on a specific risk, and often fails to examine the alternatives:

> [A] regulatory agency can engage in ad hoc calculations [about risk] because
> (continued...)

is inconsistent with: a) regulatory conclusions about the effects of lead exposure; b) scientific consensus about the mechanisms and effects of reproductive toxicants; c) wide-spread reliance on the significance of experimental (animal) data in making risk assessments; and d) legal doctrines permitting individuals to engage in their own risk-benefit analyses.

a. The court failed to address the range of health effects associated with lead. The Seventh Circuit focused its

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22/ (...continued)
its business is not the dispensation of corrective justice.... Courts and juries, on the other hand, are almost certain to ignore the difficult half of the excess risk calculation, dismissing it as too speculative to be worth the effort. Nevertheless, if prudent risk management is the ultimate objective, we cannot conduct only one half of the risk calculation.
Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Col. L. Rev. 277, 326 (1985).

inquiry on the nature and extent of potential risk to a fetus. The court provides no explanation or justification for its exclusive focus on fetal risks, and there is, in fact, no basis for concluding that the fetus is entitled to a higher level of workplace protection than workers themselves receive. Nothing in either Title VII or the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., permits this irrational and inherently sex-based approach to workplace health protection. The result in the court below is thus at odds with conclusions reached by federal regulators as to the range of serious risks from lead exposure.23/ The company's

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23/ OSHA specifically found that male workers and their future children require protection from reproductive injury at the same level that Johnson Controls "protects" women, Final Standard for Occupational Exposure to Lead, Medical Surveillance Guidelines, 29 C.F.R. §1910.1025, (continued...)

experts failed to acknowledge these findings.[24] The Seventh Circuit "essentially [took] judicial notice that OSHA is wrong," Pet.App. 94a (Easterbrook, J., dissenting), and approved a policy that recognized only one, sex-specific risk, among many documented risks to which

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23/ (...continued)
Appendix C (1989), and rejected an industry proposal to exclude fertile women from such jobs. Preamble to the Final Standard For Occupational Exposure to Lead, 43 Fed. Reg. 52952, 52966 (1978).

The U.S. Environmental Protection Agency ("EPA") has documented effects on the cardiovascular system in adult males at very low levels of lead exposure, below those set by Johnson Controls for women. EPA Regulation of Fuels and Fuel Additives, Supplemental Notice of Proposed Rulemaking, 50 Fed. Reg. 9401 (1985). The EPA concluded that reduction of lead in gasoline would result in 5,350 fewer myocardial infarctions, 1,115 fewer strokes and 5,160 fewer deaths among white males aged 40 to 59 in 1986 alone. Environmental Protection Agency, Costs and Benefits of Reducing Lead in Gasoline: Final Regulatory Impact Analysis, V-45 (1985).

24/ Because these experts were never subjected to cross-examination at trial, it is not clear how they might have responded to specific questions about the findings of federal health agencies.

federal health officials accord equivalent protection.[25]

b. The court misapprehended the significance of the evidence of male reproductive harm. The circuit court discounted evidence of impairment of male reproductive function. Pet.App. 33a-35a. Its conclusions in this regard are in conflict with an emerging scientific consensus recognizing the significance of all reproductive impairments and the complex process by which toxins operate on the reproductive systems of both men and women:

> 'Reproductive toxicants'... impair reproduction by

25/ Where the conclusions of a regulatory agency have been sustained after careful consideration, see United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981), minimally a court should conduct a thorough analysis of the evidence before concluding that health regulators had failed to make appropriate risk assessments. Cf. Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

> interfering with or altering normal physiologic processes, regulatory mechanisms, organ function, or the genetic integrity of sperm or egg cells in an exposed person.[26]

The U.S. Environmental Protection Agency ("EPA") makes it plain that exposure of either parent to reproductive toxins can affect not only sexual function and the ability to procreate, but also pregnancy outcome and the health of a future child. Evidence of injury to sperm is highly significant:

> An increase in abnormal sperm morphology has been considered supportive evidence that the agent has gained access to the germ cells. Exposure of males to toxic agents may lead to sperm abnormalities in their progeny.[27]

The National Institute for Occupational Safety and Health ("NIOSH") concludes that:

> All undisputed episodes of occupational disorders of reproduction in the recent past have involved male workers.... The weight of scientific evidence demonstrates that thresholds exist for nonmutagenic reproductive and developmental effects so that exclusionary policies based on sex are inappropriate and unnecessary in principle.[28]

c. The court improperly discounted animal data. The court found that animal

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26/ Ass'n of Schools of Public Health and National Institute for Occupational Safety and Health, Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries, Part 2, at 3 (1988) (hereinafter "NIOSH Proposed National Strategies").

27/ EPA Proposed Guidelines for Assessing Male Reproductive Risk, 53 Fed. Reg. 24850, 24851 (citations omitted) (1988).

> If the effects seen in evaluation of male reproductive end points are the result of mutagenic events (e.g., interaction with germ-cell DNA), then there is potential for transmissible genetic damage.

Id. at 24855. See also Proposed Guidelines for Developmental Toxicants, supra note 21, at 9390 (1988).

28/ NIOSH Proposed National Strategies, supra note 26, at 8-9 (emphasis added).

data demonstrating that lead may cause harm to offspring from paternal exposure was "speculative and unconvincing." Pet.App.34a. As Judge Easterbrook noted, it is an accepted principal of toxicology and risk assessment that animal studies provide valuable, if not essential, data. Pet.App.96a-97a. The history of regulation of toxic exposures reveals the critical relevance of this type of data. For example, thalidomide was known to cause birth defects in some, but not all, animal species before its destructive effects on humans were observed.[29/] If the animal data had been considered more important, the tragic birth defects attributable to that drug might have been avoided.

29/ Proposed Guidelines for Developmental Toxicants, supra note 21, at 9390.

Similarly, before it was discovered that the pesticide DBCP caused sterility in human males, it was known that DBCP caused sterility in male animals.[30/] Indeed, EPA concludes that:

> in almost all cases [of known human developmental toxicants], the experimental animal data would have predicted a developmental effect in humans.

It has thus endorsed the "basic assumption" that:

> an agent that produces an adverse developmental effect in experimental animals is assumed to pose a potential hazard to humans.[31/]

30/ U.S. Department of Labor, Occupational Safety and Health Admin., Occupational Exposure to 1,2-Dibromo-3-Chloropropane (DBCP), 43 Fed. Reg. 11514 (1978). See also EPA Intent to Cancel Registrations of Pesticide Products containing Dibromochloropropane (DBCP), 50 Fed. Reg. 1122 (1985) (DBCP also carcinogenic and mutagenic in animals).

31/ Proposed Guidelines for Developmental Toxicants, supra note, 21 at 9390, 9387. As EPA explains, animal studies can produce information in a short time period, include a large number of subjects, and control for potentially confounding

(continued...)

d. The court would deny individuals the right to make their own risk-benefit assessments. The Seventh Circuit would defer to employers' fetal risk assessments and allow them to impose their value judgments on fully competent adult women. E.g., Pet.App. 49a, 58a. In the medical context, individuals engage in their own risk-benefit analysis, once federal regulators have determined that a particular drug or treatment, although not risk free, is nevertheless effective and beneficial. Physicians and drug manufacturers who have properly tested and manufactured their products, are required

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31/ (...continued)
variables, all of which are difficult when studying humans. Ironically the Seventh Circuit itself relied on animal data in concluding that lead poses a risk to the fetus in utero, since some of the expert opinion it cited was based on animal studies: E.g., Deposition of E.K. Silbergeld, pp.49-52, cited at Pet.App. 15a.

to conform to the standards for obtaining "informed consent" from the patient or, if the patient is a minor (or a fetus), from a parent.32/

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The Seventh Circuit's failure to apply the statute as written requires case by case determinations of workplace risks. The result will be a haphazard and confusing array of policies that may conflict

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32/ See, generally, 1 S. Pegalis and H. Wachsman, American Law of Medical Malpractice at 98-103 (1980) and 2 M. Dixon and F. Woodside, Drug Product Liability § 11.02[1] (1989). A pregnant woman's informed consent is binding on the subsequently born child. Cf. Hughson v. St. Francis Hospital, 459 N.Y.S.2d 814 (N.Y. App. 1984); Roberts v. Patel, 620 F. Supp. 323 (N.D. Ill. 1985); Reiser v. Lohner, 641 P.2d 93 (Utah 1982); Charley v. Cameron, 528 P.2d 1205 (Kan. 1974). Likewise, a warning provided to a pregnant woman, if otherwise adequate, is sufficient to preclude a "failure to warn" claim by the child against the prescription drug manufacturer. See, e.g., Needham v. White Laboratories, 847 F.2d 355 (7th Cir. 1988), cert. denied, 454 U.S. 927 (1981); Walker v. Merck & Co., Inc., 648 F. Supp. 931 (M.D. Ga. 1986), aff'd, 831 F.2d 1069 (11th Cir. 1987).

with each other and with the work of federal health officials. As Judge Easterbrook noted:

> It is painful to see conflicts of this kind settled by litigation; judges cannot unravel medical mysteries by observing scientists' demeanor on the stand. This is not how scientists resolve disputes among themselves .... Scientists formulate hypotheses, collect data, and apply statistical methods to assess them; judges and jurors find this process alien.[33/]

33/ In litigation, scientific developments become frozen in time; the record is merely a snapshot of developments at a particular moment. But the scientific process is continuing. The inquiry is shaped by assumptions that derive, in part, from social forces. Once there is consensus as to the relevant assumptions, scientific knowledge accrues through an evolutionary process. See T. Kuhn, The Structure of Scientific Revolutions (2d. ed. 1970). At that point, developments may occur at a rapid pace, supported by simultaneous refinements of technology and methodology.

Crises involving thalidomide and other drugs focused research attention on female-mediated birth defects. U.S. Department of Health and Human Services, 34 Morbidity and Mortality Weekly Report 537, 538 (Sept. 6, 1985). Less attention has been directed at male-mediated reproductive effects.

(continued...)

II. REVIEW IS NEEDED TO RESOLVE CONFLICTS AMONG THE CIRCUITS REGARDING THE CONSTRUCTION AND APPLICATION OF TITLE VII OF THE CIVIL RIGHTS ACT.

This case involves critical issues regarding the meaning and applicability of Title VII and the PDA in challenges to "fetal protection" policies. On these issues, the Seventh, Fourth and the Eleventh Circuits have taken inconsistent approaches, and definitive guidance is necessary. See EEOC v. University of Pennsylvania, ___ U.S. ___, 58 U.S.L.W. 4093, 4094 (January 9, 1990).[34/] Review is

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33/ (...continued)
Becker, supra note 5, at 1259 n.170. This does not constitute evidence of differential sensitivity, but rather may simply reflect that the inquiry is at a different point in the evolutionary process. See Needleman and Bellinger, Commentary, 46 Envtl. Res. 190 (1988).

34/ Petitioners have addressed in some detail the conflict in the circuits with regard to burden of proof. See Petition at 11, 17-21. Pursuant to

(continued...)

further needed because lack of uniformity and consistency in the courts has presented grave problems for effective enforcement of Title VII, as is evident from efforts of the Equal Opportunity Enforcement Commission ("EEOC") to reconcile the various appellate court decisions with its own obligation to give effect to the statutory mandate.

A. Review Is Needed To Clarify The Meaning Of The PDA.

The PDA was enacted to insure that women would not remain marginal workers, limited by assumptions about pregnancy and its effects on their capacity to work.35/

34/ (...continued)
Rule 37.1 of the Rules of the Supreme Court, Amici do not present additional argument that this significant conflict merits the Court's review of this case, but endorse and adopt Petitioner's argument.

35/ The PDA provides:

> The terms 'because of sex' or 'on the
> (continued...)

Its legislative history emphasizes the serious social and economic costs of employment discrimination against pregnant women.36/ This case represents an opportunity for the Court to clarify the meaning and application of this important federal law. The Court has construed the PDA on two prior occasions, but in neither instance did it address the primary focus of the Act, employment discrimination

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35/ (...continued)
> basis of sex' include ... because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment purposes ... as other persons not so affected but similar in their ability or inability to work. 42 U.S.C. §2000e(k).

36/ These costs include the "devastating impact which the loss of a working mother's salary [would] have on the family unit." Legis. Hist., supra, note 14, at 116 (Statement of Senator Williams). See pp. 12-15, supra.

against women who are or may become pregnant.[37]

The PDA makes "distinctions based on women's ability to bear children sex discrimination," Pet.App.76a (Easterbrook, J., dissenting) and therefore mandates the conclusion that Johnson Controls' policy is not neutral.[38] The Seventh Circuit majority virtually ignored the PDA. Rather, the court purported to rely on

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37/ Newport News Shipbuilding and Dry Dock v. E.E.O.C., 462 U.S. 669 (1987) considered the validity of a health plan that provided female employees with benefits for pregnancy related conditions, but denied equivalent benefits to the spouses of male workers. In California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987), the Court considered whether a state statute requiring employers to provide leave and reinstatement only to pregnant women was preempted by Title VII.

38/ Judge Posner agrees that the PDA "shows that the present case really is a disparate treatment case, that is, a case of intentional discrimination ...." Pet.App. 65a.

Wright v. Olin, 697 F.2d 1172, and Hayes v. Shelby Memorial Hospital, 726 F.2d 1543.[39]

In Wright, the court rejected the argument that the PDA required the case to be analyzed as one of overt discrimination: "Without regard to whether that would make any difference on the facts of this case, we reject it as conceptually unsound...." 697 F.2d at 1184 n.17. Without further mention of the PDA, the Court concluded that the disparate impact/business necessity model was best suited for analysis of such an exclusionary policy,[40] in part

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39/ As explained below, those courts took different approaches to the effect of the PDA. However, because the elements of the rebuttal case as set forth in Hayes parallel those of the business necessity defense articulated in Wright, see Hayes, 726 F.2d at 1548 n.8, the Johnson majority was able to find the approaches taken by the Fourth and Eleventh Circuits similar. Pet.App. 24a-25a.

40/ It stated that while the "facial neutrality" of the rule might be subject to logical

(continued...)

because the policy could never be defended as a bona fide occupational qualification ("BFOQ"), id. at 1185 n.21, the only statutory defense for intentional discrimination. 42 U.S.C. 2000e-2(e). See Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702 (1978).

Unlike the Seventh and the Fourth Circuits, the Eleventh Circuit did "tend to agree" that the hospital's restrictive policy presented a case of overt discrimination to which the only affirmative defense is BFOQ. Hayes, 726 F.2d at 1547-48. It nevertheless treated the policy as merely raising a presumption of facial discrimination which could be rebutted by evidence showing that it was neutral "in the sense that it effectively and equally

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40/ (...continued)
dispute, the dispute would involve "mere semantic quibbling." Wright, 697 F.2d at 1186.

protects the offspring of all employees." But see Connecticut v. Teal, 457 U.S. 440 (1982) and Manhart, 435 U.S. at 716-17.

Decisions in the Seventh, Eleventh and Fourth Circuits are thus in substantial disarray with regard to the significance of the PDA. In contrast, they are uniform in their apparent reliance on benign motive to justify a departure from the statutory scheme. Although it is well-established in Title VII that good faith or benign motive is not a defense to discrimination,41/ these courts have altered the rules in cases involving patently discriminatory policies allegedly intended to protect

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41/ Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975). Cf. Orr v. Orr, 440 U.S. 268 (1979) (equal protection case). A showing of a facially discriminatory policy triggers the employer's affirmative obligation to prove the existence of a BFOQ. Cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121-22 (1985) (age discrimination case). See also Petition at 17-19, 25-26.

against fetal harm. Defendants may not simply pick and choose among defenses, however, the defense must match the prima facie case.

B. Review Is Required To Define The BFOQ Defense.

The Seventh Circuit held, in the alternative, that Johnson Controls' policy was justified as a BFOQ. In this respect, it conflicts with both Wright and Hayes. Both the Fourth and Eleventh Circuits explicitly acknowledged that a sex-based rule barring fertile women could not meet the stringent BFOQ standard because there was no showing or even assertion that women were unable to perform the jobs at issue. Wright, 697 F.2d at 1185 n.21; Hayes, 726 F.2d at 1549. As Judge Easterbrook noted, the PDA "has a built-in BFOQ standard: unless pregnant employees differ from others 'in their ability or inability to

work,' they must be treated 'the same' as other employees." Pet.App. 73a.

Johnson Controls does not assert that women are incapable of performing the jobs from which they are barred. The Seventh Circuit concluded, however, that the "industrial safety-based concern of protecting the unborn child from lead exposure" was part of the "essence" of Johnson Controls' battery-making business, and that the sex-based policy was reasonably necessary to further this objective. Pet.App. 54a. Overall, the court construed the BFOQ defense to "give meaningful and thoughtful consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the

unborn child." Pet.App. 42a (emphasis in original).42/

Until the Seventh Circuit's decision below, neither this Court nor any federal appellate court conducting a BFOQ analysis had ever held that the essence of the business extends beyond the specific requirements and demands of the particular job.43/ Cf., e.g., Western Air Lines, Inc.

42/ The court below adopted a policy of deference to employers' decisionmaking in its BFOQ analysis. Pet.App.49a. This constitutes yet another serious erosion of important Title VII principles. Cf. Washington v. Davis, 426 U.S. 229, 247 (1976) (Title VII prohibits deference to the "seemingly reasonable" acts of employers); Criswell, 472 U.S. at 421-22 and n.36 (employers required to show more than a "rational basis in fact" to satisfy BFOQ standard of Age Discrimination in Employment Act).

43/ Even customer preferences do not justify facial discrimination, as the Seventh Circuit itself has recognized. See Rucker v. Higher Education Aids Board, 669 F.2d 1179, 1181 (7th Cir. 1982) (black clientele's preference for black counselors does not justify racial discrimination); Fernandez v. Wynn Oil Co. 653 F.2d 1273, 1276-77 (9th Cir. 1981) (customer preference does not (continued...)

v. Criswell, 472 U.S. 400 (1985) (essence of airline's business is safe transportation of passengers); Dothard v. Rawlinson, 433 U.S. 321 (1977) (essence of prison official's job is to maintain prison control and security); Tullis v. Lear School, Inc., 874 F.2d 1489 (11th Cir. 1989) (essence of school bus driver's business is safe transport of passengers); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (essence of business is to provide role model for adolescent girls). There is simply no basis for the Seventh Circuit's conclusion that the statute permits employers to stand in loco parentis for the potential fetuses

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43/ (...continued)
qualify gender as a BFOQ); Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (customer preference for female flight attendants does not justify policy excluding males).

of its women workers. Such a result would be beyond the scope of the BFOQ provision and directly contrary to the PDA.44/

C. Review Is Necessary To Provide Guidance To The Enforcement Agency.

The EEOC's duty to enforce Title VII imposes practical demands to investigate and litigate cases in all jurisdictions. Conflicts among the circuits on the appropriate framework for analyzing "fetal hazard" cases have made this a virtually impossible task. This is evident from the EEOC's recent effort to clarify its approach. See EEOC, Policy Guidance on

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44/ While achieving workplace safety is a laudable and desirable goal, it should not and need not be accomplished at the cost of prohibited forms of employment discrimination. The potential for such discrimination extends to all workers, as genetic characteristics may be associated with differential susceptibility to workplace hazards. While the ability to predict such susceptibility may be useful to individuals in making employment decisions, these predictive tools should not be used as a basis for discrimination.

United Auto Workers v. Johnson Controls, Inc., Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). (Pet.App. 127a, et seq.).45/

As the EEOC observes, the Seventh Circuit's decision in this case represents a "significant departure from the analytical framework previously developed by the courts." The EEOC has thus termed "problematic" the Seventh Circuit's "hybrid approach" to a claim of facial discrimination:

> [I]t is more consistent with Title VII's structure and purpose to allow a defendant in a case challenging a facially discriminatory fetal protection policy only the statutory defense of

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45/ Previously, in the Policy Statement on Reproductive and Fetal Hazards under Title VII, 8 Fair Empl. Prac. Manual (BNA) 401:6013 (Oct. 3, 1988), the EEOC had recognized that exclusionary policies constitute overt sex discrimination, "per se violations" of Title VII. As an interim measure, it instructed its staff to follow the lead of the existing court decisions.

> proving that sex is a 'bona fide occupational qualification...'

Pet.App. 134a (citations omitted).

The Commission's position, however, leaves unresolved a number of key issues. Recognizing the conflicting rules in the circuits with regard to the appropriate defense and the type of evidence that would establish it, the Commission frankly requests "judicial interpretation of the language of the BFOQ provision." Pet.App. 135a. In part, because of the "reality" that each of the circuit courts has permitted some defense to an exclusionary policy, id. at n.6, the Commission is "unwilling to say that no possible defense is available," id. Nevertheless, it recognizes "considerable merit" in Judge Easterbrook's views to that effect. Id. at n.7.

In sum, the Commission is torn between the practical necessity to investigate and prepare cases for courts that have permitted defenses and the obligation to enforce the statute as written. The lack of consensus in the courts has created overwhelming enforcement difficulties, which can only be resolved by guidance from this Court, as the EEOC itself suggests.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statements of Interest of *Amici Curiae*

The **AMERICAN CIVIL LIBERTIES UNION (ACLU)** is a nationwide, non-partisan organization of over 250,000 members. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment and discrimination against women of child-bearing capacity. The **American Civil Liberties Union of Wisconsin** is the Wisconsin state affiliate of the ACLU.

The **AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (ACTWU)** is an international trade union, with 260,000 members in the apparel, textile and related industries. It has many members -- both women and men

-- exposed to lead and other reproductive chemical hazards in a wide variety of industries. Many of these workers would be directly affected by the principles established in this case.

The **AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW)**, a national organization of over 140,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUW supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.

The **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, (AFSCME)**, which represents approximately one million public employees, is the nation's largest public employee labor union. AFSCME represents many men and women in the health care and sanitation industries whose jobs continuously expose them to hazardous toxic substances and chemicals.

The **AMERICAN PUBLIC HEALTH ASSOCIATION**, founded in 1872, is a non-governmental society whose membership, including its state and local affiliates, is comprised of approximately 50,000 health professionals interested in promoting high scientific standards, action programs, and public policy for good health. Its reproductive health policy, adopted in 1979, "condemns the corporate practice of

forcing women to choose between their jobs and the right to reproduce [and urges governmental agencies to develop] occupational exposure standards that protect women, men, and the fetus."

The **AMERICAN SOCIETY OF LAW AND MEDICINE** was founded in 1972 to provide a forum for interdisciplinary discussion of the complex issues at the interface of law, medicine and health. Ongoing informational efforts include the publication of two quarterly journals, Law, Medicine and Health Care, a leading forum for interprofessional analysis of current issues, and the American Journal of Law and Medicine, a law review co-published with the Boston University School of Law. For the reasons stated in the attached brief, the Society opposes discriminatory policies that undermine public health goals.

The **CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH** is a not-for-profit organization dedicated to workers' health and safety rights. Its members include 40 area union locals, individual organized and unorganized workers, concerned health providers, attorneys, educators, and others. It believes the Seventh Circuit Court of Appeals decision in this case undermines the OSHA lead standard and the health of all workers. Furthermore, the decision simultaneously restricts women's employment opportunities and leaves men exposed to hazardous work conditions.

The **COALITION OF LABOR UNION WOMEN** is a membership organization of 20,000 female and male trade unionists who promote the rights of working women. The Coalition of Labor Union Women has, since its founding

in 1974, advocated workplace rules and practices that protect all workers.

The **COMMITTEE FOR RESPONSIBLE GENETICS** is a group of approximately 600 scientists and others concerned with social and ethical implications of biotechnology, including reproductive technology, which promotes the broadest possible public participation in development of relevant decisions. The Committee for Responsible Genetics opposes exclusionary employment practices because they violate workers' civil rights and fail to ensure the reproductive health of all employees in the workplace.

The **COMMUNICATION WORKERS OF AMERICA (CWA)** is an international trade union, representing 650,000 workers in information industries. It has many members -- both men and women -- exposed to toxic chemicals

in their work who are directly affected by the principles established in this case.

The **EMPLOYMENT LAW CENTER** is the principal project of the Legal Aid Society of San Francisco and is nationally recognized for its expertise regarding state and federal laws prohibiting employment discrimination. As an organization concerned with securing full equality in employment opportunities, the Employment Law Center has a strong interest in this case.

The **ENVIRONMENTAL DEFENSE FUND (EDF)**, is a non-profit advocacy organization with over 60,000 members nationwide. Since its founding in 1967, EDF has been involved in efforts to reduce human exposure to environmental toxins, including substances such as lead that are known to have serious reproductive and other health effects. EDF

has participated extensively in administrative, judicial and legislative proceedings on the control of lead in gasoline, drinking water, incinerator ash, point source emissions, consumer products, and in the workplace. EDF's concerns about lead toxicity extend to male-mediated effects of lead on reproductive function as well as female-mediated reproductive effects and other health effects on adults and juveniles of both sexes.

The **INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO** is a national labor organization headquartered in Akron, Ohio. It has over 300 affiliated local unions, in over 500 bargaining units representing about 50,000 hourly workers in the U.S. chemical industry. Many of its members are occupationally exposed to lead. The Union is concerned that a company may

discriminate in work assignments rather than reducing exposure levels to make the workplace safe for workers of both sexes. This is a particularly critical concern with exposure to material such as lead, which has demonstrable reproductive effects for men as well as women.

The **MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MassCOSH)** is a coalition of 85 labor organizations, representing over 150,000 workers and 150 occupational health professionals in Massachusetts. MassCOSH is dedicated to improving health and safety conditions in the workplace through technical assistance, training, and education and political action. MassCOSH, which has a reproductive hazards project and regularly conducts workshops with member locals regarding reproductive hazards in the workplace,

believes that all workers are entitled to a safe workplace.

The **NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL)**, has over 400,000 members in 40 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The **NATIONAL BLACK WOMEN'S HEALTH PROJECT**, is a health, education and advocacy organization which works to improve the quality of life for African-American women. It works to promote non-discriminatory approaches to insure that all African-American women have access to health services, including abortion, that

maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African-American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

The **NATIONAL ORGANIZATION FOR WOMEN (NOW)** is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the right to full employment opportunity without sacrificing health or reproductive rights.

The **NATIONAL WOMEN'S HEALTH NETWORK (NWHN)** is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations

representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's right to have complete control over their bodies, particularly the right to decide when, where and how to give birth, and opposes policies which condition employment on the loss of fertility.

The **NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC)**, is a nationwide membership organization dedicated to the election and appointment of more women to political office. NWPC also works to ensure equality for women in all aspects of life.

The **NATIONAL WOMEN'S LAW CENTER** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the

Center has worked to secure equal opportunity in employment for women through, inter alia, the full enforcement of Title VII. It has a deep and abiding interest in assuring that victims of employment discrimination on the basis of sex, including pregnancy, have their rights vindicated under the law.

The **NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC)**, is a non-profit, membership corporation headquartered in New York City. NRDC has a national membership composed of over 120,000 citizens dedicated to the defense and preservation of the human environment and the natural resources of the United States. Among the purposes of NRDC is to ensure that the laws designed to protect human health are fully and properly enforced and that all necessary steps are taken to reduce all risks, to males and to

females, resulting from exposure to toxic chemicals.

The **NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (NYCOSH)** is a non-profit membership organization dedicated to the right of all workers to safe and healthy working conditions. Its membership includes over 160 union locals and regional councils, as well as individual workers, medical and legal professionals and community activists, all working together to eliminate workplace hazards. NYCOSH, which has a reproductive hazards committee, believes that exclusionary policies are not the appropriate solution to reproductive hazards in the workplace.

9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN, is a nationwide membership group dedicated to improving the status and working conditions of office workers. For

more than fifteen years, 9 to 5 has been concerned with bringing attention to the health and safety hazards faced by working women. We strongly believe that employers should meet their legal obligations to provide safe workplaces to all workers, and are opposed to the exclusion of women as a substitute for correcting job hazards.

The **NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH PROJECT (NCOSH)** is a private, non-profit membership organization working to improve occupational safety and health conditions for all North Carolinians. Approximately 70 local unions representing 27,000 workers and 400 health and legal professionals concerned about occupational health are NCOSH members. NCOSH believes that exclusionary employment practices and policies are inappropriate and illegal solutions to the problem of dangerous

occupational exposures. Exclusionary policies violate the rights of women to pursue equal employment and the rights of all workers to a safe workplace.

The **NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF)** was founded as a non-profit women's rights law center in 1970 by founders of the National Organization for Women, and since that time has consistently worked on important legal cases and in advocacy and public education concerning the rights of women. NOW LDEF has particular concern for women's employment, reproductive and economic rights, all of which are threatened by irrational and discriminatory workplace policies such as that involved in this case.

The **OCCUPATIONAL SAFETY AND HEALTH LAW CENTER (OSHLC)** is a public interest law firm which represents individuals,

families, organizations, and unions in health and safety matters. The OSHLC has an on-going concern with regard to reproductive rights and the protection of both men and women on the job from any risk to those rights.

The **OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAW)** has 100,000 members, a substantial number of whom are employed in industries and are potentially affected by exclusionary employment policies similar to the one at issue in this case. The OCAW opposes exclusionary policies which single out members of one sex, and it actively seeks to develop and encourage the use of policies which will protect the health of all workers.

The **PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH (PHILAPOSH)** is a private, non-profit corporation which

seeks to promote the health and safety of employees in Eastern Pennsylvania, Southern New Jersey, and the State of Delaware. PHILAPOSH has approximately 135 affiliated local unions with a combined individual membership of over 150,000. PHILAPOSH has regularly participated in litigation which raises important health and safety issues, either as a party or as amicus curiae. Over the last several years, PHILAPOSH has presented a number of workshops and conferences on reproductive hazards in the workplace and issues of particular concern to women workers.

PLANNED PARENTHOOD FEDERATION OF AMERICA (PPFA) is a not-for-profit corporation organized in 1922. It is the nation's oldest and largest voluntary family planning agency. Its 180 affiliates in forty-three states and the District of

Columbia provide medical, educational and counseling services to meet the family planning needs of over two million Americans per year. PPFA believes that the ability to regulate one's own fertility is a basic human right and is concerned that female workers not be penalized in their exercise of that right. The organization further believes that a resolution of this matter can and must be found that protects the health interests of all workers of both sexes and their children without sacrificing the workers' right to equal employment opportunity.

The **ROCHESTER COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (ROCOSH)** is a non-profit organization comprised of unions, health and legal professionals, industrial hygienists, educators, and concerned individuals who believe all working people

are entitled to a safe and healthy workplace. Our union affiliates represent about 32,000 persons. ROCOSH is interested in this case because of its belief that working people should not have to choose between making a living or preserving their life and health. Upholding Johnson Controls' "fetal protection policy" would pervert OSHA's mandate that employers provide a safe workplace and threaten womens' employment opportunities. If allowed to stand, this decision could have implications for several workplaces in the Rochester area.

SANTA CLARA CENTER FOR OCCUPATIONAL SAFETY AND HEALTH (SC-COSH) is a group representing 170 labor unions, workers and occupational health professionals in northern California, dedicated to improving

health and safety conditions in the workplace.

The **SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)** represents 925,000 workers in the U.S. and Canada. Its workers work primarily in the service sector, in a broad spectrum of workplaces including hospitals, offices, and food service facilities where they are exposed to toxic substances that adversely affect reproduction and health generally. The use of exclusionary practices, instead of a comprehensive approach to health protection, could threaten the economic status of a large number of members.

The **SILICON VALLEY TOXICS COALITION**, based in San Jose, California, includes labor unions, environmental organizations, doctors and other public health workers, firefighters, clergy, and neighborhood

organizations. It advocates that industry and government must protect the public health and works to prevent exposure of the public to toxic substances.

The **UNITED MINE WORKERS OF AMERICA, [INTERNATIONAL UNION (UMWA)]** is a 100-year old organization which represents approximately 150,000 miners and retirees in North America. The UMWA is committed to the complete elimination of impediments to job opportunities based on race and gender. The UMWA believes that employers must remove, and protect against, work-related health hazards. Barring women or others from jobs due to those hazards is an evasion of the employer's responsibility for workplace health and safety. Moreover, such exclusionary policies do not promote safety because men remain exposed to the hazards. Rather, these practices

shift the risks and burdens of an unhealthy work environment to those least able to bear them.

The **WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (WNYCOSH)** is an organization comprised of 60 area union locals (representing 55,000 workers) and a number of health professionals in the Western New York area. WNYCOSH is part of a consortium of organizations, including the Cornell-Chemical Hazards Information Program, the SUNY Buffalo Toxicology Research Center, and the Union Occupational Health Center Clinic, which cooperate in providing educational and technical assistance services to workers in the region. WNYCOSH is concerned that any judicial decision that undermines the OSHA lead standard is inappropriate since there

is evidence that lead constitutes a reproductive hazard for both sexes.

WOMEN EMPLOYED, based in Chicago, Illinois, has a national membership of 3,000. It assists working women with problems of sex discrimination and health and safety issues. The policy at issue in this case threatens womens' employment rights and is thus of concern to Women Employed.

The **WOMEN'S LAW PROJECT (WLP)** is a non-profit feminist law firm which seeks to advance the legal and economic status of women through litigation, public education, and individual counseling. During the past fifteen years of its existence, WLP's activities have included work in the areas of reproductive freedom, pregnancy discrimination, and employment discrimination. WLP is dedicated to

eliminating discrimination against women based on childbearing capacity and to securing the right of women workers to equal access to safe workplaces.

WOMEN'S LEGAL DEFENSE FUND is a national advocacy organization working to advance the rights of women in the areas of work and family. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of a significant employment discrimination counseling program, and through agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws. It has had particular interest in implementation of the Pregnancy Discrimination Act, which it worked to pass in 1978.

NICHOLAS A. ASHFORD, J.D., PH.D., is an Associate Professor of Technology and Policy at the Massachusetts Institute of Technology. He has written extensively regarding reproductive hazards in the workplace. His publications include "Legal Considerations of Reproductive Hazards in Industry in the United States," in Pregnant Women at Work, edited by Geoffrey Chamberlain (The Royal Society of Medicine and The Macmillan Press Ltd., London, 1984), and "The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention," (with Charles C. Caldart), Industrial Relations Law Journal, Volume 5, Issue 3, pp. 523-563 (1983).

DAVID BELLINGER, PH.D., and HERBERT NEEDLEMAN, M.D., are professors at the Harvard University School of Medicine and the University of Pittsburgh School of

Medicine, respectively. They join this brief because their research was cited by Johnson Controls as supporting its sex-based policy, a conclusion they believe is insupportable. They seek to ensure that their research is placed in its proper biological and epidemiological context.

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JOHN F. ROSEN, M.D., is the Head of the Division of Pediatric Metabolism at the Albert Einstein College of Medicine. In

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JEANNE STELLMAN, PH.D., is Associate Professor of Clinical Health, School of Public Health, Columbia University. Dr. Stellman has directed the Women's Occupational Health Resource Center, a non-profit organization that generates information regarding the occupational health needs of women workers through authoritative publications and research.

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The following are directors of university and hospital affiliated

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In The

Supreme Court of the United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

vs.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATE OF CALIFORNIA AND THE CALIFORNIA FAIR EMPLOYMENT & HOUSING COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Pursuant to Sup.Ct.R. 36.2, the State of California, by its Attorney General, and the California Fair Employment & Housing Commission respectfully submit this brief as *amici curiae* in support of Petitioners. The parties have consented to the filling of this brief, and their letters of consent are being filed with the Clerk of the Court, Sup.Ct.R. 36.2.

Johnson Controls, Respondent herein, has contended that California's Fair Employment and Housing Act, Cal. Gov. Code § 12900 *et seq.*, like Title VII, should excuse its categorical exclusion of women in the interest of fetal protection. Rejecting the reasoning of the federal courts on the issue, Amicus California Fair Employment and Housing Commission refused to recognize the asserted defense, ruling that Johnson's fetal protection program (FPP), the same FPP at issue herein, constituted unlawful sex discrimination. *Department of Fair Employment and Housing v. Globe Battery, A Division of Johnson Control,* FEHC Dec. No. 87-19, 1987-88 CEB Precedential Decisions 9 (1987). That decision was upheld by the California Court of Appeal. *Johnson Controls, Inc. v. California Fair Employment and Housing Commission,* 218 Cal.App.3d 517, 267 Cal.Rptr. 158 (1990).[1]

Amici submit this brief out of a concern that California's female employees will not be accorded the protections against sex discrimination provided by Title VII of

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[1] Johnson's petition for discretionary review by the California Supreme Court was denied by that court on May 17, 1990.

the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* While Amici believe that the public has an interest in workplace fetal safety, Amici believe that this public interest must be reconciled with the public's substantial interest in equal employment opportunities for women. Amici contend that it is for Congress, and not for the courts or employers, to consider these competing public interests and to change the balance if concern for fetal protection is to outweigh concern for equal employment opportunity.

ARGUMENT

THE COMPETING PUBLIC INTERESTS AFFECTING WORKPLACE FETAL SAFETY CANNOT BE BALANCED WITHIN THE FRAMEWORK OF TITLE VII LITIGATION, AND THE DECISION WHETHER SEX DISCRIMINATION SHOULD BE EXCUSED IN THE INTEREST OF FETAL SAFETY SHOULD BE LEFT TO CONGRESS

There is no question that society has a legitimate and significant interest in workplace fetal safety. The question presented here is whether employers generally, and Johnson Controls (Johnson) in particular, should be permitted to assert that societal interest as justification for sex discrimination. More precisely, the question is whether the courts should construe Title VII to incorporate a defense to sex discrimination predicated upon fetal safety.

Once an employer decides to exclude women from the workplace in asserted furtherance of fetal protection, the issue is necessarily one within the contemplation of Title VII. However, courts applying Title VII are not

equipped to resolve the fundamental policy disputes which attend consideration of such categorical discrimination. Nevertheless, rather than leave it to Congress to determine fundamental policy on this point, the federal courts, no doubt with good intentions, have chosen instead to determine policy themselves. This have given rise to manifestly result-oriented analytical methodologies that contort Title VII and employment discrimination law out of all recognizable proportion. Indeed, with all respect, the extent to which the circuit courts have gone out of their way to *circumvent* settled law belies any pretense at judicial *enforcement* of congressional intent.

Because of the analytical havoc that has been wrought by the circuit courts endeavoring to justify this form of sex discrimination, and for fundamental policy reasons, Amici respectfully urge this Court to reverse the decision of the Seventh Circuit, and hold that voluntary adoption of a fetal protection program does not excuse categorical exclusion of women.

A. Judicial Treatment Of Sex Discrimination Predicated Upon Fetal Protection Has Been Ill-Reasoned And Manifestly Result Oriented

The history of this issue in the circuit courts has been one of attempting to circumvent the Pregnancy Discrimination Act (PDA), Pub.L. 99-555, §1, 92 Stat. 2076 (1978). That Act described discrimination "because of sex" or "on the basis of sex" to include, without limitation, "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982).

Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work." (*Ibid.*)

The PDA was enacted for the specific purpose of overcoming this Court's decisions in *General Electric v. Gilbert*, 429 U.S. 125 (1976) (*Gilbert*) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (*Satty*). *See* H.R.Rep. No. 95-948, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. Admin. News 4749, 4751; S.Rep. No. 95-331, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. Admin. News 4749, 4750; *see also California Federal S & L v. Guerra*, 479 U.S. 272, 277 (1987). After enactment of the PDA, it would seem obvious that *potential pregnancy*, like pregnancy itself, could not be used as a basis for excluding women except upon satisfaction of the proof required to excuse sex discrimination itself. Under Title VII, discrimination on the basis of sex is permissible "where sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1982).

Nevertheless, both the Fourth and the Eleventh Circuits devised convoluted methodologies to avoid clear congressional intent, in order to treat exclusion of women for fetal protection as "gender neutral" practices having only an incidental disparate impact on women. The purpose of these efforts was to afford the employer the opportunity to defend categorical exclusion of women as a "business necessity." The courts recognized that if fetal protection programs (FPP's) were treated as disparate treatment sex discrimination, the employer would have to

prove that sterility or non-pregnancy was a bona fide occupational qualification (bfoq).

The Fourth Circuit's decision in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) (*Wright*) is complicated by the fact that the FPP there in issue was alleged by the plaintiffs to be one part of a pervasive scheme of policies and practices by Olin which were deliberately designed to deny women job opportunities. See 697 F.2d 1172, 1178, 1179. The allegations of these practices and policies, taken as a whole, appeared to present a "classic" case of covert discrimination in the mode of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the employer denying any discriminatory motive in the creation of any of the challenged programs and policies.

Olin Corporation, therefore, relying on *McDonnell Douglas*, met the plaintiffs' allegations of discriminatory intent by proffering a purportedly nondiscriminatory business reason, viz., fetal protection. The employer then contended that the plaintiffs failed to prove disparate treatment, because they failed to prove that the proffered business reason was pretextual. 697 F.2d at 1183.

The claimants argued, however, that *McDonnell Douglas* had no application for consideration of the FPP because the very existence of the program creates, not a *rebuttable* presumption of discriminatory purpose, but an *irrebuttable* presumption of such a purpose; the program on its face applies only to women, and was never intended otherwise. 697 F.2d at 1183. In other words, claimants had made out not only a *prima facie* case of sex-based discrimination; they had proved *overt* discrimination. In such a case, the employer had the burden, not merely of

going forward with evidence to meet a prima facie showing by the plaintiffs, but the burden of presenting an affirmative defense to proven discrimination.[2]

The conflict between the parties, then, was whether, at trial, Olin had the burden merely of articulating a nondiscriminatory business reason for the FPP (*McDonnell Douglas*), or, instead, had the burden of proving an affirmative defense, by a preponderance of the evidence – whether the defense be proof of a "bfoq" or proof of "business necessity."[3]

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[2] Olin's FPP imposed a burden on women which did not fall at all on men. Moreover, the claimants argued, it is a burden which was imposed *only* on women. The claimants, therefore, argued that the FPP constituted gender-based disparate treatment, rather than merely "disparate impact" under this Court's *Gilbert-Satty* formulation, requiring Olin to prove that lack of child-bearing capacity is a bfoq. 697 F.2d at 1183. Alternatively, claimants argued, even if the FPP were treated as discrimination only on the basis of pregnancy rather than on the basis of gender – a material distinction following *Gilbert* – Olin must still justify the program by affirmative proof of business necessity, since the program manifestly has a disproportionately adverse impact on women. 697 F.2d at 1183-1184. Furthermore, claimants appear to have argued, even if the FPP were treated as "disparate impact" discrimination *prior* to enactment of the PDA, the program should be treated as disparate treatment *after* the enactment. See, 697 F.2d at 1183, n. 17.

[3] Since this Court's opinion in *Wards Cove Publishing Co. v. Atonio*, ___ U.S. ___, 104 L.Ed.2d 733 (1989), the "business necessity" justification for disparate impact discrimination is no longer an affirmative defense at all. Following *Wards Cove*, the employer has the burden only of producing evidence of a

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As the court saw it, if discrimination on the basis of pregnancy were treated as "disparate treatment," then fetal safety would not suffice as a business necessity to prove the defense of bfoq – "properly applied." 697 F.2d at 1185, n. 21. If, however, discrimination on the basis of pregnancy were treated as incidental discrimination on the basis of a gender-neutral factor (per *Gilbert*), then fetal safety could be raised as a business necessity under the "wider" standard. (*Ibid.*)

Congress' enactment of the PDA, of course, made it statutorily untenable to treat discrimination on the basis of pregnancy as "gender-neutral," and required proof that categorical discrimination against the subclass of women (pregnant women) was justifiable on the ground that non-pregnancy was a bona fide occupational qualification. In order to avoid the impact of the PDA, therefore, the court had to ignore the Act; the court, accordingly, did so – expressly. 697 F.2d at 1183, n. 17.

The court's justification for this action was essentially that the distinction between facial discrimination and incidental discrimination should not stand in the way of permitting an employer to raise fetal safety as a justification for discriminating on the basis of pregnancy. 697 F.2d at 1185, n. 21 ("The inappropriateness of applying the overt discrimination/b.f.o.q. theory of claim and

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business justification in order to meet a prima facie case of disparate impact discrimination. 104 L.Ed.2d at 753. California, by regulation, still treats the "business necessity" defense as an affirmative defense. Cal. Code Regs., tit. 2, § 7286.7(b).

defense . . . is that, properly applied, it would prevent the employer from asserting a justification defense which under Title VII doctrine it is entitled to present.") Treating the two forms of discrimination as nothing more than "semantic quibbling" (697 F.2d at 1186), the court simply chose that side of the "quibble" which it believed would permit the employer to raise fetal safety as a defense.

Thus, although the court found it to be "semantic quibbling" to quarrel over the *effects* of the discriminatory practice on women, the court obviously believed the *defenses* to be *substantively* distinguishable, characterizing the "disparate-impact business necessity" defense to be "obviously wider" than the bfoq defense. 697 F.2d at 1185, n. 21.[4] Even were it conceptually possible to have a

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[4] The "business necessity" defense is concerned with facially neutral rules, standards, and criteria, rather than with class-based exclusion, and it is conceivable that a business justification which would not suffice as a bfoq for class-based disparate treatment might, nevertheless, suffice under the "disparate impact/business necessity" standard. But even the abstract logic of such a possibility vanishes when what is at issue is not a rule, standard, or criterion which *might* disproportionately exclude members of a protected class, but rather a determinative, if conceptually "neutral," trait or condition such as pregnancy or child-bearing capacity, which, if it excludes anyone, can *only* exclude members of a protected class. In such a case, it is, indeed, "semantic quibbling" to argue any distinction between a "disparate impact" on the class (women) and "disparate treatment" of that class; the "neutral" trait or condition is but a proxy for membership in the protected class itself. This was evidently the conclusion of Congress in responding to this Court's rationale in *Gilbert*. See *International Union, supra* 886 F.2d at 909 (dis. opn. of Easterbrook, J.)

"semantic quibble" with substantively different consequences, one would assume that, in view of the policies behind Title VII, the substantive consequences of the "quibble" would devolve to the benefit of the adversely affected employees. Nevertheless, the Fourth Circuit concluded that substantive consequences of this "quibble" should devolve to the benefit of the employer.[5]

Ignoring the PDA, the court characterized the employer's pregnancy-based policy as being "literally expressed in gender-neutral terms, [but having] as its obvious and indisputably intended consequence the imposing upon women of a 'substantial burden that men need not suffer.' " 697 F.2d at 1186. Under that characterization, the court reasoned, the "disparate impact/business necessity" approach of this Court in the *Satty* case would apply. *Ibid.*

The Eleventh Circuit in *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (*Hayes*) took a somewhat different, though equally result-oriented, tack in analyzing a gender-based fetal protection program.[6] The court conceded, at least superficially, that after enactment

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[5] Having characterized the "business necessity" defense as "obviously wider" than the bfoq defense, the court suggests that defending on the basis of bfoq or "business necessity" is really only a matter of litigation strategy within the election of the employer. 697 F.2d at 1185, n. 21. With all respect, the suggestion is preposterous; even if the defense were a matter of choice, why would an employer ever *choose* to rely on what the court concedes is far a more difficult defense to prove?

[6] The court agreed with the *result* in *Wright*, but, in view of the PDA, sought to present a "clearer" methodology. *Hayes*, 726 F.2d at 1546, n. 2.

of the PDA, discrimination on the basis of pregnancy was categorical discrimination on the basis of sex, on a par equal to discrimination on the basis of race. 726 F.2d at 1546-1547, 1547-1548. The court also recognized that, given the express statutory equivalency of pregnancy-based discrimination and discrimination on the basis of sex, an employer can defend on the basis of a bona fide occupational qualification only by proving a connection between pregnancy or potential for pregnancy and the essence of the business operation. 726 F.2d at 1549. The court agreed with the district court that " '[p]otential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the bfoq issue.' " *Ibid.*

But, like the Fourth Circuit, the *Hayes* court perceived the standard of "business necessity," required to excuse adverse impact discrimination, to be less than that required to prove a bfoq. This court too, then, sought to fashion a methodology which would make the employer's pregnancy-based discrimination a facially neutral practice with only an "incidental" disparate impact.

Accordingly, having paid "lip service" to the PDA, the court proceeded as though the Act did not exist: The court began its analysis by stating that discrimination on the basis of pregnancy creates only a *rebuttable presumption* of sex discrimination:

> We begin by establishing a *presumption* that if the employer's policy by its terms applies only to women or pregnant women, then the policy is facially discriminatory. That presumption may be rebutted, however, if the employer can show that it effectively and equally protects the offspring of all employees. In other words, the employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace, and (2) that the hazard applies to fertile or pregnant women, but not to men. 726 F.2d at 1549.

The court thus reasoned that a policy which excludes only women from jobs, though *manifestly* discriminatory on the basis of gender, is "really" gender-neutral, if the reason for firing only women is to protect offspring, and if the firing of women for this reason protects the offspring of both the male and female employees. And, the court explained, an employer can show that the offspring of both the male and female employees are "protected" by showing that the job is hazardous to the fetus but not to reproductive cells. Since both women and men carry reproductive cells, but only women carry the fetus, the policy is "neutral" because only those who carry fetuses are excluded from the jobs.[7]

Disregarding, for the moment, the lack of any apparent logical connection between the exclusionary policy and protection of the offspring of male employees, the

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[7] Of course, since the relevant pool of employees is all those employees having the jobs from which only women are excluded, such a policy can be said equally to *protect* the offspring of the male employees in such jobs only upon a showing that all of the male employees in those jobs are sexually involved with all of the female employees in those jobs. Otherwise, the policy of excluding only women from the jobs cannot fairly be said to "protect" the offspring of the male employees at those jobs; all that could be said is that the policy is *irrelevant* to any offspring of those male employees.

Hayes analysis is itself gender-biased. Under the FPP, female employees "enjoy" both the benefit and the burden of a program designed to further fetal safety. In the court's view, what converts such a program from gender-specific to gender-neutral discrimination is the additional benefit of the program *to men*; the burden of the program *on women* is, thus, immaterial to this formulation. The Eleventh Circuit cited to no authority for its "disparate-burden/egalitarian-benefit" analysis.

The *Hayes* reasoning is little more than a return to the discredited *Gilbert-Satty* distinction between discrimination on the basis of pregnancy *qua* pregnancy and discrimination on the basis of gender.[8] In *Gilbert*, this Court

[8] Although the Eleventh Circuit facially rejected the *McDonnell Douglass* "pretext" methodology (726 F.2d at 1547-1548), the court nevertheless adopted a hybridized form of that analysis. Under *Hayes*, discrimination on the basis of pregnancy makes out a "prima facie" case of sex discrimination which can be rebutted by an assertion that the discrimination was for the purpose of fetal protection. Pregnancy-based discrimination is sex discrimination, under Hayes, only if the pregnancy is, in effect, found to be a pretext for "real" sex discrimination, i.e., if it appears there is no demonstrable need for fetal protection, or if it is shown that the fetal offspring of male employees are also at risk, but male employees are not excluded from the jobs. Under *McDonnell Douglas*, the burden would be on the plaintiff to prove pretext; under *Hayes*, it would appear that the employer has the burden of proving that pretext does not exist. Thus, despite Congress' efforts to eliminate the distinction drawn in *Gilbert* between discrimination based on pregnancy and discrimination based on sex, the *Hayes* court permits an employer to demonstrate that discrimination based on pregnancy is not discrimination based on sex. Indeed, congressional enactment of the PDA is largely irrelevant to the

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stated that discrimination based on pregnancy qua pregnancy was facially neutral; in *Satty*, the Court found that such a "facially neutral" basis for discrimination must be justified by proof of business necessity if it "impose[s] on women a substantial burden that men need not suffer." *Satty, supra*, 434 U.S. at 142. The *Hayes* court reversed the order: If a fetal protection program imposes on women a burden that men do not suffer, then it is a "facially neutral" program.

Unlike in *Satty*, the *Hayes* formulation does not require proof that the program is justified as a business necessity; the *Hayes* court simply declared that fetal protection is a justification for discrimination on the basis of pregnancy in the first instance. 726 F.2d at 1552, n. 14. While the court characterized fetal protection as "an affirmative defense" which must be raised after rebuttal of the "prima facie" case of discrimination (726 F.2d at 1552), the court also recognized that proof of this defense is obviated by the fact that it is the very justification that was used to "rebut" the prima facie case of disparate treatment in the first instance:

> The employer's business necessity defense applies automatically, just as the employee's prima facie case of disparate impact applies automatically. That is because to reach the disparate impact stage of analysis in a fetal protection case, the employer has *already* proved – to overcome the presumption of facial discrimination –

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Eleventh Circuit's analysis, since precisely the same analysis would have been possible under this Court's *Gilbert-Satty* formulation.

> that its policy is justified on a scientific basis and addresses a harm that does not affect men. To add any more requirements would be to render it nearly impossible to have a fetal protection program under any circumstances. 726 F.2d at 1553; emphasis in original.

In effect, then, under *Hayes* there is no need for an employer to demonstrate that fetal protection is a business necessity at all. An employer need only show proof that fetuses are at risk and that only women need shoulder the burden of the program in order to carry out the program's purposes. Upon such a showing, the employer has not only rebutted the "prima facie" case of sex discrimination, but will also be *deemed* to have proven business necessity.

The Eleventh Circuit also suggested that, if an employer cannot demonstrate that exclusion of women alone is necessary to protect fetuses, *then* the policy is facially discriminatory, and the employer must prove that nonpregnancy is a bfoq. 726 F.2d at 1549. Despite the superficial symmetry of the court's approach, the analysis is fundamentally flawed. If an employer is unable to show that the offspring of male employees are at risk, then the employer has, perforce, proven "classic" overt discrimination on the basis of sex, and the inquiry necessarily ends there. Even the hypothetical bfoq defense suggested by the court (726 F.2d at 1549, n. 9) would not be a defense to discrimination based on *fetal protection*; it would be a defense to an exclusion predicated on *pregnancy-related* incapacity, to which the court's fetal protection analysis would not apply in any event.[9]

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[9] The only situation in which the court's analysis would make analytical sense would be a case in which the employer

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The irony of *Hayes* is that, in the court's *ad hoc*, if well-intentioned, efforts to force Title VII into a formulation which would achieve the court's desired result, the court arrives at a methodology which actually negates its implicit thesis, viz., that Congress must have intended that fetal safety constitute a justification for discrimination on the basis of pregnancy.

The unavoidable conclusion, from the court's "prima facie case" methodology, is that Title VII affirmatively *prohibits* employers from using fetal protection as a justification for excluding female employees in any case where the offspring of both male and female employees are at risk. Under the court's formulation, Title VII will permit employers to use fetal protection as a justification for excluding female employees only in those cases where it is solely the offspring of female employees that are at risk. Not only does the court's analysis impute a rather macabre reasoning process to Congress, but it compels the conclusion that Congress does not believe fetal safety to be a business *necessity* at all. Under the court's analysis, Congress not only expects that employers will ignore fetal safety in cases where the offspring of both male and female employees are at risk, Congress affirmatively *forbids* employers to protect unborn offspring, in such cases, by displacing women.

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justified categorical exclusion of pregnant women both on the ground of fetal protection and on the ground of pregnancy-related incapacity. In such a case, only the fetal protection justification would be analyzed according to the *Hayes* formulation; the "incapacity" justification would *separately* be analyzed under traditional bfoq analysis.

Finally, *Hayes'* treatment of fetal safety as a business justification is simply illogical. If fetal safety is not a sufficiently compelling business justification for excluding only female employees when the offspring of both male and female employees are at risk, how can it be said to be a sufficiently compelling justification to do so when it is only the offspring of female employees that are at risk? In this formulation, the sufficiency of fetal safety as a business justification for excluding pregnant women is determined, not by the reasons for the exclusion, but rather by who is excluded.

The holding of the Seventh Circuit below simply adopts, without significant analysis, the results of *Wright* and *Hayes*. *International Union, UAW v. Johnson*, 886 F.2d 871, 883-886 (7th Cir. 1989) (*International Union*). In *dictum*, however, the court opined that Johnson's fetal protection program could be justified under a bfoq analysis. *International Union, supra*, 886 F.2d at 893-901. In its analysis, the court relied on its earlier decision in *Torres v. Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) for the proposition that Johnson's FPP rests on objective differences between men and women: "*Torres'* conclusion that Congress intended the bona fide occupational qualification defense as a recognition of the real differences between men and women accords with Congress' approach in both Title VII and other contexts concerning matters involving distinctions based upon realistic physical differences between men and women." *International Union*, 886 F.2d at 894.

However, Johnson Controls' fetal protection program does not discriminate on the basis of "objective differences" between men and women; it discriminates on the

basis of paternalistic and stereotypic notions of women. Whereas the fact that women are biologically capable of becoming pregnant is concededly a difference between men and women, that is not the basis of the employer's discriminatory policy. Johnson's policy is to exclude women, not because they are *pregnant*, but because they are *fertile women*.

From the perspective of fetal protection, *until* a fertile woman becomes pregnant, she stands in precisely the same position as a fertile man; in either case, the danger to unborn offspring is nonexistent, or, at least, comparable (assuming that there may be some adverse effect on gametogenesis posed by exposure to lead compounds.) It is not the abstract fact that women are *biologically capable* of becoming pregnant which supposedly requires the exclusion of women, but rather the chance that they *will become* pregnant – a factor speaking more about the ability of women to control their lives and their bodies than about "objective" biological distinctions.

By excluding all women solely on the basis of fertility, Johnson, with the approval of the Seventh Circuit, makes at least the following assumptions about women – none of which has anything whatsoever to do with "objective differences" between men and women: (1) that all unmarried fertile women are either presently actively involved in sexual relationships with men, or will definitely become so involved; (2) that fertile women who are actively involved in sexual relationships with men or who may become so involved, are or will be involved with a *fertile* man (a woman's partner, for example, might have had a vasectomy); (3) that fertile women who are actively involved in sexual relationships with a fertile

man, or will become so, cannot be trusted to employ reasonably adequate prophylactic measures against an unexpected pregnancy; and (4) that fertile women, even when possessed of sufficient information about the work-site hazard, are incapable of properly weighing the changes of unexpected pregnancy, notwithstanding use of prophylactic measures, against the possibility of fetal hazard should she become pregnant.

Furthermore, Johnson's policy presumes that Johnson is better suited to safeguard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself. This is manifest paternalism, a self-proclaimed prerogative of protecting unborn children from the presumed folly of their mothers.

Amici are aware of no authority for the proposition that employers are somehow invested with the status of a private *parens patriae* entitling them to substitute their judgment concerning the welfare of unborn offspring for that of the mother. Nevertheless, the Seventh Circuit endorsed the notion that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, but rather by removing from women the opportunity to make any choices in the matter at all. 886 F.2d at 897.[10]

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[10] The Seventh Circuit stated: "Since they have become a force in the workplace as well as in the home because of their desire to better the family's station in life, *it would not be improbable* that a female employee might somehow rationally discount this clear risk in the hope and belief that her infant would not be adversely affected from lead exposure." 886 F.2d

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Distilled to its essence, this is not discrimination based on "objective differences" between men and women, it is discrimination based on categorical assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices. With absolutely no disrespect intended, Amici would point out that if an applicant for one of the affected jobs at Globe Union were a fertile *nun*, Johnson's purported justification for excluding her from the job – fetal protection – would manifestly be far from persuasive; or alternatively, it would be far more evident that Johnson's concern is less with biological differences and more with the possibility that the women would violate her vow of celibacy. See *Johnson Controls, Inc. v. California Fair Employment and Housing Commission, supra*, 218 Cal.App.3d 517, 551 n.16, 267 Cal.Rptr. 158. A fetal protection policy such as Johnson's does not treat women as individuals, but implicitly concedes to *all* women a capacity to exercise judgment little

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at 897 (emphasis added). This "lack of improbability" that a woman "might somehow" choose continued hazardous employment over the wellbeing of her offspring was considered sufficient by the court to divest all fertile women of the opportunity to make an informed choice in the matter. In stark contrast to this assumed inability of working women fairly to consider the best interests of their offspring, stands the obvious *probability* that an employer would ignore potential hazards to fetuses altogether in some cases, viz., where fetal safety would require displacement of *both* male and female employees. Nevertheless, it is assumed that the employer, rather than the woman, is better suited to act in the best interests of fetuses on behalf of society.

better than that of rabbits: Any woman who *can* become pregnant *will* become pregnant. The Seventh Circuit recognized that "a determination of whether a proposed BFOQ is 'reasonably necessary' to furthering the objective of industrial safety requires that Johnson Controls ' " 'had reasonable cause for believing that all or substantially all [women capable of pregnancy] would be unable to perform safely and efficiently the duties of the job involved.' " ' " 886 F.2d at 897 (citations omitted). However, the court appears to have ignored the fact that there was no evidence whatsoever that all or substantially all fertile female applicants for the disputed jobs *would* become pregnant and, therefore, would pose the risk asserted.[11] The court, like Johnson itself, appears merely to have assumed this to be the case, proceeding then to justify depriving women of the opportunity to make an informed choice. 886 F.2d at 897.

B. Neither Society's Interest In Workplace Fetal Safety Nor Its Interest In Equal Employment Opportunity For Women Are Adequately Served By Allowing Employers To Discriminate Against Women In Purported Furtherance Of Fetal Safety

Johnson Controls insists that its fetal protection program excludes only women from certain jobs because only women need to be excluded from these jobs in order to protect fetal health. It should be obvious, however, that

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[11] The only evidence on this point appears to be that, in the four years between 1978 and 1982 in which Johnson utilized its informed-consent fetal protection policy, *six* women were known to have become pregnant. 886 F.2d at 876-877.

an employer will not *voluntarily* adopt a fetal protection program in any situation where the hazard to the fetus can be mediated through the bodies of both the mother and the father. In such a case, a *genuine* concern for fetal safety would call for the exclusion of *both* male and female employees – an obviously impracticable solution.

Where concern for fetal safety would require exclusion of both male and female employees, the employer will most likely, and not surprisingly, ignore the societal concern altogether, in favor of economic self-interest. Alternatively, an employer faced with such a dilemma might nevertheless choose to exclude only employees of one sex, and either (1) minimize the significance of scientific evidence that would argue for exclusion of both male and female employees, or (2) argue that fetal safety justifies exclusion only of women, even though societal interest in fetal safety would be *better* served by exclusion of both male and female employees.

If fetal safety suffices to excuse sex discrimination when only women need be excluded to satisfy society's concerns, so the argument would go, fetal safety should suffice to excuse sex discrimination even when both men and women should be excluded. Society's interest in fetal safety is not gender-specific.

To be sure, a self-serving choice to exclude only women, when both men and women should be excluded, would be challenged as "classic" sex discrimination. But, in any subsequent Title VII litigation testing the validity of such a practice, a court would have only two options: Either excuse the discriminatory practice, or enjoin the

discrimination. An order requiring an employer to exclude all employees or none would obviously be met with a choice for the latter option.

In any case, what is clear is that, under any of these alternative scenarios, one or another of society's interests is always sacrificed. Where employers are permitted to exclude women pursuant to voluntarily-adopted fetal protection programs, it is never *society's* interest that is being served at all, but is rather always the economic self-interest of the *employer*. An employer is free wholly to ignore society's interest in fetal safety (except as mandated by law) whenever a decision voluntarily to vindicate that societal interest would dis-serve economic self-interest.

Similarly, a court which enjoins "classic" sex discrimination, in a case where both male and female employees should be excluded in the interests of fetal safety, abandons the societal interest in fetal safety in favor of society's interest in equal employment opportunities. Alternatively, a court which excuses "classic" sex discrimination against women, in a case where both male and female employees should be excluded in the interests of fetal safety, compromises *both* society's interest in fetal safety *and* society's interest in equal employment opportunities.

For this reason, the fetal safety defense cannot be equated to the third-party safety or privacy defenses. *Cf., Western Air Lines v. Criswell*, 472 U.S. 400 (1985); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). In those cases, the safety interest urged in defense of discrimination was

asserted to be *necessary* to the safe operation of the enterprise.

Where fetal safety is concerned, however, the asserted safety interest is unrelated to the actual operational needs of the business and is purely a *convenience*, to be asserted by the employer or not – at the *employer's* sole option. Under the reasoning of Johnson here, fetal safety is either a burden an employer is under no obligation to assume at all, or it is a "business necessity" *if* an employer chooses to assume the responsibility.

Although employers may justify discrimination as serving society, it is, in every case, society that is the *loser*; the employer stands only to *gain* by employment discrimination in purported vindication of fetal safety. Moreover, at such point as an employer chooses voluntarily to assume responsibility for vindication of society's interest in fetal safety, it will always be *women* who lose.

Society unquestionably has a legitimate interest in workplace fetal safety, and government has agencies created to address that interest. See *International Union, supra* 886 F.2d at 920-921 (dis. opn. of Easterbrook, J.) Workplace fetal safety is *not*, however, an interest that can be incorporated into employment discrimination analysis without doing manifest violence not only to society's interest in fetal safety but also to society's interest in equal employment opportunities. Society's conflicting interests concerning the issue of workplace fetal safety and employment discrimination are *not* served by permitting employers an option to discriminate against women whenever it serves their economic self-interest to do so.

If the public's interest in equal employment opportunities for women is to be balanced against the public's interest in workplace fetal safety, it is for *Congress* to strike that balance – after considering *all* of the competing interests involved. The Courts cannot hope to balance all of those interests within the limited framework of Title VII.

CONCLUSION

For the reasons stated, Amici respectfully request that the Court reverse the decision of the Seventh Circuit below. Amici urge the Court to hold that, absent further action by Congress to amend Title VII, fetal protection alone does not excuse categorical discrimination of women on the basis of fertility or pregnancy.

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No. 89-1215

IN THE
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October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *ET AL.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Writ of *Certiorari* to the
United States Court of Appeals for
the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE ASSOCIATION OF BLACK WOMEN ATTORNEYS, THE COMMITTEE ON WOMEN'S RIGHTS OF THE NEW YORK COUNTY LAWYER'S ASSOCIATION, AND THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* 1/

The Association of the Bar of the City of New York is comprised of more than 18,500 lawyers. While most practice in the New York City metropolitan area, the Association has members in every state and in more than 40 countries. The Association has long advocated the elimination of gender-based discrimination in employment, including discrimination based on the capacity to become pregnant. Policies that exclude women based on reproductive capacity frustrate the goal of economic equality for women. If such policies are permitted to stand, as many as twenty million high-paying industrial jobs may be foreclosed to women workers. *UAW* v. *Johnson Controls, Inc.*, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting).

We submit this brief in support of the women workers who are challenging Johnson Controls' policy because we are acutely aware that women lawyers were also at one time barred from pursuing their livelihood. Like the Court of Appeals below, courts barring women from practicing law indulged in a "romantic paternalism" that characterized women as primarily wives and mothers. For example, the Supreme Court of Wisconsin excluded Lavina Goodell because:

> The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.

In re Goodell, 39 Wis. 232 (1875). And a distinguished member of this Court voted to exclude Myra Bradwell based upon the assumption that most women would marry, and have as their "paramount destiny and mission . . . the noble and benign offices of wife and mother." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 446 (1872) (Bradley, J., concurring).

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

Discrimination against women in law continued long after the paternalistic rationale for it had fallen into disfavor. Indeed, from 1870, when the Association was formed, until 1937, women were excluded from its membership. 2/ Myriad reasons were given for such discriminatory treatment, but none actually addressed the ability of women to perform as lawyers.

We believe that so-called fetal protection policies are similarly symptomatic of a lingering refusal to concede that women are both able and entitled to choose their own vocations as well as to make decisions about how their employment affects the well-being of their already existing and future children. Masked as a benign effort to protect potential fetuses, Johnson Controls' policy and others like it serve principally to forestall women's struggle for economic equality.

The Association of Black Women Attorneys was formed in 1976 and is comprised of 490 Black women attorneys, law students and other individuals interested in increasing the number of Black women attorneys in New York State. We join this brief on behalf of the women workers challenging Johnson Controls' policy and the decision below upholding it because both severely limit women's employment opportunities in violation of the language and spirit of Title VII.

The Committee on Women's Rights of the New York County Lawyers' Association ("NYCLA") is composed of women and men attorneys who concentrate their efforts on the elimination of discrimination against women. Founded in 1908, NYCLA is a bar association with a membership of approximately 11,000 attorneys, which often participates as *amicus curiae* in litigation directed to furthering women's civil rights.

2/ The Association has gained considerably by admitting women to its ranks. Today, many women are actively involved in the Association's committees. Seven members of the Executive Committee are women, including its Chair, and women lead more than twenty-five standing and special committees.

The New York City Commission on Human Rights ("the Commission") is a local administrative agency charged with eliminating all prohibited forms of discrimination within the City of New York, including gender discrimination in employment. N.Y.C. Admin. Code Sec. 8–101 *et seq.* The Commission adjudicates claims of employment discrimination under local law, and as a section 706 deferral agency, the Commission also adjudicates employment discrimination claims filed under Title VII.

The Commission takes seriously its public charge that all New Yorkers be afforded full employment opportunities free from discrimination on the basis of gender. Thus, the Commission is deeply concerned about the ways in which fetal protection policies reinforce sex-based occupation segregation and thereby exclude women from better paying jobs traditionally held by men.

SUMMARY OF ARGUMENT

Despite the conclusions of federal regulators and health officials that both men and women face hazards to their reproductive systems and other health risks from exposure to lead, the Court of Appeals deferred to Johnson Controls' sweeping decision to exclude only women from lead exposure positions in its battery plant. The breadth of this ban on women workers of "childbearing capacity" is striking. The policy presumes that all women under age 70 are fertile absent medical proof of sterility. It extends even to jobs with no risk of lead exposure, but which might lead to a promotion into such a job.

In upholding this policy, the Court of Appeals specifically distanced itself from the tradition of *Muller* v. *Oregon*, 208 U.S. 412 (1908), which sustained a "protective" labor law curtailing women's work hours. Nevertheless, the decision below is in fact a contemporary version of *Muller* in its acquiescence to outmoded notions about women's reproductive and economic lives, as well as in its selective reliance on science to perpetuate and bolster those notions. Both Johnson Controls' policy and the decision to uphold it resurrect archaic stereotypes that have long since been rejected by Congress, this Court, and the American public.

In language that is now regarded as paradigmatic of stereotypical notions of women workers, the *Muller* Court stated:

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of the public interest and care in order to preserve the strength and vigor of the race.

208 U.S. at 421.

Under Title VII, such sexist assumptions about women's "physical structure" and "maternal functions" can no longer serve as justifications for gender-based discrimination. This is true whether the purported focus of concern is "the strength and vigor of the race" or, as here, the health of a statistically improbable fetus.

The *Muller* Court upheld a law limiting women's work hours on the ground that healthy mothers would ensure the health of "future generations." The court below upheld a policy excluding fertile women workers, ostensibly to protect fetal health. Both decisions view women solely in their reproductive capacity, reinforce the notion that women should be childbearers and homemakers, and denigrate women's participation in the workforce. Both decisions assume that only women are responsible for the health and caretaking of future generations. And both decisions reinforce the demeaning perception that women cannot make the decisions that most vitally affect their individual lives as well as the lives of their existing and potential families. Like the court below, the *Muller* court believed that its conclusions were compelled by science. It is now apparent, however, that the *Muller* Court succumbed to myth. Though perhaps less explicitly, the Court of Appeals similarly fell prey to ideas wholly at odds with scientific fact and the reality of women's lives.

As Judge Posner recognized, however, the analogy between *Johnson Controls* and *Muller* is not a perfect one. 886 F.2d 871, 906 (Posner, J., dissenting). Whereas the Oregon legislature believed it was protecting not only the "strength and vigor of the race" but also women, Johnson Controls purports only to protect fetuses.3/ It would thus be a misnomer to characterize Johnson Controls' policy as "paternalistic" toward women: Here, the asserted goal of fetal protection is to be achieved not for women's benefit, but rather at women's expense.

As with the statute sustained in *Muller*, the practical effect of Johnson Controls' policy and the decision upholding it is to deepen sex segregation of the workforce, to deprive women of their livelihood, and to send the message to women that, indeed, their anatomy should be their destiny. Like the statute sustained in *Muller*, the employer policy upheld by the court below cannot coexist with Title VII and the Pregnancy Discrimination Act. *Amici* urge this Court to reverse that decision and to declare all policies that exclude women based upon reproductive capacity invalid *per se* under prevailing law.

3/ Its policy, however, undermines even that goal because it: (1) irrationally applies to only one class of vulnerable individuals; and (2) ignores the importance of women's wages and employee health benefits to fetal health. For further development of the public health issues raised by this case, see Brief *Amici Curiae* submitted by the American Public Health Association and others.

ARGUMENT

I.

JOHNSON CONTROLS' POLICY RESURRECTS HARMFUL STEREOTYPES ABOUT WOMEN WORKERS REMINISCENT OF *MULLER* V. *OREGON*, IN VIOLATION OF TITLE VII.

The assumptions about women's proper place in society that provided the rationale for *Muller* v. *Oregon* are now an illegal basis, under Title VII, for employer decisions. The history of protective labor legislation has taught that even well-meaning statutes, intended to "protect" women and their potential offspring, served to entrench economic inequality between the sexes, placing women not so much "on a pedestal" as "in a cage." Title VII bars not only such statutes, but also employer policies that exclude women based upon their reproductive function.

This case starkly illustrates how reliance on stereotypes of women also harms men. Johnson Controls' policy treats men as though they were invulnerable to the toxic effects of lead, notwithstanding the substantial data to the contrary presented to the court below. The result: Men get less protection, and women get fewer jobs.

A. Title VII Forbids Employers To Exclude Women Workers Based On Stereotypes.

Title VII's plain language forbids employers from discriminating on the basis of sex unless sex is a bona fide occupational qualification ("bfoq"). 42 U.S.C. §2000e-2(e) (1982). In 1978, Congress enacted the Pregnancy Discrimination Act, which amended Title VII to clarify that sex discrimination includes distinctions based on "pregnancy, childbirth, and related medical conditions." 42 U.S.C. §2000e(k). 4/ In

4/ As Justice White and the Chief Justice have recognized, the Pregnancy Discrimination Act "gave added meaning to discrimination on the basis of sex"; and it means exactly "what it says in a situation where it is directly implicated." *California Fed.*

Continued

so doing, Congress rejected this Court's view in *General Elec. Co.* v.*Gilbert*, 429 U.S. 125 (1976), that policies affecting persons with the capacity to become pregnant could be facially "neutral," and made clear that such policies are in fact facially discriminatory against women. 5/

Congress thus recognized that discrimination based on unfounded assumptions about the relationship between women's capacity to bear children and their ability to perform certain work was simply inconsistent with the goal of guaranteeing women's civil rights. 6/ Moreover, Congress recognized that women's capacity to become pregnant had unfairly served as the greatest obstacle to women's full integration into the workplace. 7/

Sav. and Loan Ass'n v. *Guerra*, 479 U.S. 272, 107 S. Ct. 683, 698 (1987) (White J., dissenting). It says that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). *See also, Price Waterhouse* v. *Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1811 (1989) (Kennedy, J., dissenting) ("by definition sex is the but-for cause of the employment decision" where the basis of the decision is pregnancy).

5/ *Amici* adopt rather than reiterate petitioners' argument with respect to the proper burden of proof under Title VII. Irrespective of the burden of proof adopted by this Court, *amici* believe that Johnson Controls' policy and the lower court's *Muller*-like analysis of that policy are fundamentally at odds with the language and spirit of Title VII.

6/ Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977).

7/ That this recognition served as the impetus for the Pregnancy Discrimination Act is apparent from the legislative history:

> Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women . . .

S. Rep. No. 95-331, 95th Cong., 1st Sess. at 6-7 (1977).

With the passage of Title VII, protective legislation of the kind upheld in *Muller* v. *Oregon* became unenforceable, and sex-specific labor statutes were uniformly struck down. Courts recognized that Congress, in enacting Title VII, established a policy that individuals must be judged as individuals, and not on the basis of characteristics generally attributed to groups defined by sex, race, religion, color or national origin. Courts recognized that protective labor legislation thwarted this goal. *See Rosenfeld* v. *Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 423 n. 18. (1975).

This Court has often noted the harmful effects of sex stereotyping on women: "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse* v. *Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1791 (1989) (quoting *City of Los Angeles, Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)). 8/

8/ In the equal protection context, this Court has repeatedly denounced reliance on "[a]rchaic and overbroad generalizations" about women's "role" as childbearers and the value of women's work. *See Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 725-26 (1982). *See also, Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (noting "inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection"); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-85 (1973) (provision of special benefits has "put women, not on a pedestal, but in a cage."). In *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984), this Court observed:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

B. Johnson Controls' Policy Impermissibly Relies Upon Misleading Stereotypes Of Women, In Violation Of Title VII.

The stereotypes and generalizations embodied in Johnson Controls' exclusionary policy and reflected in the lower court's opinion include: (1) that all fertile women are likely to become pregnant; (2) that healthy pregnancies depend exclusively upon women; (3) that women's employment and wage-earning are not essential to their well-being or to the well-being of future generations; and (4) that women are incapable of autonomous, ethical decision-making about issues relating to themselves and their families.

The Court of Appeals insists that its decision, unlike *Muller*, is based on "real" differences between men and women. *Johnson Controls*, 886 F.2d at 898. If by "real" the court meant "biological," the distinction is meaningless. *Muller* was also based upon "obvious," "real" differences — differences that Title VII now makes irrelevant, absent a showing that biology is related to ability to perform the job. "Real" or biological differences, upon which stereotypes have been based, have served as the greatest impediment to women's full integration into the workforce. If employers need only invoke "real" differences to justify policies aimed at pregnant or potentially pregnant persons, Title VII will become virtually meaningless for women.

Moreover, even "real" differences between men and women, such as women's greater longevity, do not justify gender-based policies that disregard individual variation among women. This Court has held that Title VII bans the use of accurate, sex-based actuarial tables in setting pension and life insurance rates. *Manhart*, 435 U.S. 702 (1978). Although women as a group live longer than men, the Court held, Title VII requires that employees be treated as individuals. *Id.* at 707-11. *See also*, *Arizona Governing Comm.* v. *Norris*, 463 U.S. 1073, 1084-86 (1983).

Although protective laws and the *Muller* rationale which sustained them are now "museum pieces," *Johnson Controls*, 886 F.2d

at 913 (Easterbrook, J., dissenting), the Court of Appeals' decision below closely parallels Justice Brewer's rationale in *Muller* in its acquiescence to unfounded generalizations about women's lives.

1. As In *Muller*, The Court Of Appeals' Decision Relied On Unfounded Stereotypes About Women's Reproductive Lives.

Perhaps the most compelling indication of reliance on generalizations about women is the extreme over-inclusiveness of the policy itself. 9/ Johnson Controls' policy is unconscionably overbroad. The Court of Appeals' decision fails to take account of social reality in that few women who work at Johnson Controls will actually become pregnant. Whether an individual woman will become pregnant and whether she will bear a child are influenced by various factors, including but not limited to marital status, age, number of existing children, pre-existing medical conditions that might complicate pregnancy, method of contraception, sexual orientation, and attitude toward abortion. Indeed, the birth rate is near zero at age 40, with only a .41 percent probability that a woman between the ages of 40 and 44 will give birth, and a .02 percent probability that a woman age 45 to 49 will give birth in a given year. U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States* 62 (1989) (1986 rates). Moreover, four out of five sexually active, fertile women not seeking pregnancy use contraceptives. 10/ Thus, the generalization that all

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9/ Protective labor laws for women were similarly overbroad. As one scholar has written:

> [T]he reasoning in *Muller* and its successors was as faulty as the laws were overinclusive . . . . [I]t is difficult to see how [women's supposed physical and socioeconomic weaknesses] justified denial of bar admission in 1869 [or] prohibition of night work in 1915 and 1924.

J. Baer, *The Chains of Protection*, at 130-31 (1973) (hereinafter "Baer").

10/ Specifically, 83.2% of sexually active women between the ages of 15-44 of childbearing capacity, who are not intentionally seeking pregnancy, use contraceptives. *See Statistical Abstract* at 66.

women workers are actually or imminently pregnant is simply not a true one; and under Title VII, "[e]ven a *true* generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708 (emphasis added).

Moreover, of those women who do become pregnant, most will have blood levels below 30ug/dl; and of those few whose blood levels exceed 30 ug/dl, most will nevertheless bear healthy children. *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting). "Concerns about a tiny minority of women cannot set the standard by which all are judged." *Id.* Title VII protects individuals, and "[i]ndividual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." *Manhart*, 435 U.S. at 710. Johnson Controls is thus statutorily prohibited from treating all women workers as though actually pregnant or on the verge of becoming so. [11/]

In concluding that "the risk of transmission of harm to unborn children is confined to fertile female employees," the Court of Appeals simply discredited the scientific evidence before it that was at odds with its stereotypic view of women's reproductive lives. *UAW* v. *Johnson Controls*, 886 F.2d at 890. Although presented with copious evidence that lead is a toxin that affects all human beings, [12/] the court below discounted this evidence as it applies to men. The court thereby

11/ Johnson Controls' policy not only violates Title VII, but it also contravenes the spirit of the Occupational Health and Safety Act, 29 U.S.C. § 651 *et seq.* (OSH Act). The OSH Act requires employers to maintain a workplace "free from recognized hazards that are causing or likely to cause death or serious physical harm," 29 U.S.C. § 654 (a)(1), and authorizes and directs the Secretary of Labor to promulgate health and safety standards to assure "that no employee will suffer material impairment of health or functional capacity . . ." 29 U.S.C. 655 (b)(5). *United Steelworkers of America* v. *Marshall*,

Continued

disregarded the conclusions of the federal agency charged with monitoring workplace safety. The Occupational Health and Safety Administration ("OSHA") has announced that "because of the demonstrated adverse effects of lead on reproductive function in both the male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30ug/100g maximum permissible blood level in both males and females who wish to bear children." 29 C.F.R. § 1910.1025, Appendix A, p. 185 (1989).

By excluding women instead of making the workplace safe for men's reproductive systems as well as women's, Johnson Controls fails adequately to protect either men or men's potential offspring. [13/] Men thus continue to face reproductive risks, and both they and their potential children may face other health risks associated with lead.[14/]

647 F.2d 1189, 1256 n.96 (D.C. Cir. 1980) *cert. denied*, 453 U.S. 913 (1981) (OSHA has authority to promulgate occupational standards that undermine the use of exclusionary policies.) *But see Oil, Chemical and Atomic Workers Union* v. *American Cyanamid*, 741 F.2d 444 (D.C. Cir. 1984) (OSH Act's "general duty clause" does not prohibit the use of exclusionary policies).

12/ *See, e.g.*, Deposition of Silverstein, Record at pp. 9–14 (both men and women suf fer effects of lead exposure); Deposition of Legator, *Id.* at pp. 15–25, 90–95 (effects of lead exposure on male reproductive system: spontaneous abortion; chromosomal damage; behavioral anomolies in offspring; teratospermia; effects on spermatogenesis). The court ignored this evidence on the ground that it was based on animal studies, despite significant testimony that animal studies are relevant to the human experience and that human epidemiological data also confirmed the animal studies. *See* Deposition of Silverstein, *Id.* at pp. 17–19; Deposition of E.K. Silbergeld, *Id.* at 43–44. Note that the Court of Appeals itself relied on animal data in concluding that lead poses a risk to the fetus in utero, since some of the expert opinion it cited was based on animal studies. *See, e.g.*, Deposition of E.K. Silbergeld, *Id.* at pp. 49–52.

13/ The importance of men's labor is generally assumed. Therefore, men either remain employed, as here, under conditions hazardous to their health, or the workplace is restructured so they can continue working. For example, in 1977, it was found that men who worked with the pesticide Dibromochloropropane ("DBCP") suffered from low and zero sperm counts. Studies showed DBCP to be carcinogenic in animals and capable of causing genetic disease. DBCP was therefore excluded from the workplace, not men. J. Bertin, *Reproductive Hazards in the Workplace*, Reproductive Laws for the 1990s, Cohen & Taub, eds., at 280 (1989).

14 Lead exposure poses risk to the heart, brain, kidneys, liver, and the nervous system. *See* 29 C.F.R. § 1910. 1025, Appendix A.

Similarly, the *Muller* Court read and considered the now famous brief submitted by Louis D. Brandeis and Josephine Goldmark, which included evidence that excessive working hours are harmful to men and women. [15/] The *Muller* Court nevertheless concluded that there were scientific reasons for limiting women's employment. The "science" relied upon in *Muller* now seems like a relic. [16/] Summarizing the Brandeis/ Goldmark brief, the *Muller* Court stated:

> The reasons for the reduction of the working day to ten hours — (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of children, (d) the maintenance of the home — are all so important and so far reaching that the need for such reduction need hardly be discussed.

15/ See, e.g., *Brief for Defendant in Error, Muller* v. *Oregon*, No. 107, U.S. Supreme Court, October Term, 1907 at 24-26.

16/ For example, the Brandeis/Goldmark brief, quoting from Report of the Maine Bureau of Industrial Labor and Statistics, at 142 (1888), argued that:

> Woman is badly constructed for the purpose of standing eight to ten hours upon her feet. I do not intend to bring into evidence the peculiar position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column. The knee joint of the woman is a sexual characteristic. Viewed in front and extended, the joint in but a slight degree interrupts the gradual taper of the thigh into the leg. Viewed in a semi-fixed position, the joint forms a smooth ovate spheroid. The reason of this lies in the smallness of the patella in front, and the narrowness of the articular surfaces of the tibia and femur, and which in man form the lateral prominence, and this is much more perfect as a sustaining column than that of a woman. The muscles which keep the body fixed upon the thighs in the erect position labor under the disadvantage of shortness of purchase, owing to the short distance, compared to that of a man, between the crest of the ilium and the great trochanter of the femur, thus giving to man a much larger purchase on the leverage existing between the trunk and the extremities. Comparatively the foot is less able to sustain weight that of a man, owing to its shortness and more delicate formation of the tarsus and metatarsus.

Brief for Defendant in Error, *Muller* v. *Oregon*, No. 107, U.S. Supreme Court, October Term, 1907, at 19.

208 U.S. at 419, note.

Although the prejudice is more subtle in *Johnson Controls*, the court's selective use of scientific evidence to bar women's employment is really a contemporary version of *Muller's* distortion of science to bolster prevailing prejudices of the day. [17/]

2. As With Muller, The Court Of Appeals' Decision Causes Women Serious Economic Harm.

The Court of Appeals' disproportionate focus on women's reproductive capacity results in a view of women as marginal, nonessential members of the workforce. The notion that women should sacrifice their economic livelihood to further the apparent goal of enhancing fetal health implies that "the interests of the next generation always trump the interests of living women." *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting).

The Court of Appeals' "balancing" of the interests of the employer, the employee, and the fetus, is fundamentally misguided. First, Title VII has already struck that balance in favor of the employee. Second, it is both irrational and counterproductive, from a public health point of view, to pit woman against fetus, as though their interests were adverse. Women who want children want healthy fetuses and often take great risks to ensure the well-being of their future children. [18/] Third, women's fundamental interest in self-determination is entirely missing from the court's balancing process. The suggestion that employers may properly substitute their judgment for a woman's when it comes to the care of her potential

17/ Scholars have observed that the way science is used is itself often suffused with value judgments and prejudice. *See, e.g., Men's Ideas, Women's Realities: "Popular Science" 1870 to 1915*, L. Newman, ed., (1984); S. Gould, *The Mismeasure of Man* (1981).

18/ *See generally*, Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L. J. 9 (1987).

offspring or her need for employment, is both humiliating and insulting to women.[19]/

The degree to which the court below underestimates the importance of a woman's employment to herself, her family and to society, is apparent from the language it uses in characterizing women's interest in work: Most women, as most men, do not work simply because of an "interest in financial reward"; nor are most women merely secondary wage-earners who work merely "because of their desire to better the family's station in life." *Johnson Controls*, 886 F.2d at 883 and 897, respectively. Rather, most women work because they must. The court's implication that women work merely to supplement the income of a male wage-earner is disturbingly reminiscent of a time when it was thought that many women worked to earn "pin money." [20]/

19/ Women are certainly no less capable than men of taking the precautionary measures required by OSHA to avoid excessive blood levels. The mandatory training program instructs men and women who work in lead exposure positions as to the purpose, proper selection, fitting, use, and limitations of various protective equipment, including respirators and special clothing. 29 C.F.R. § 1910. 1025(1). All employees are further informed that any employee may be removed from work if and when the average of three consecutive blood sampling tests show a lead level at or above 50 ug/100g of whole blood. 29 C.F.R.§ 1910. 1025(k)(2). Thus, both men and women have the information with which to make responsible decisions, and " [n]o legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation..." *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting).

20/ At the close of World War II, the Labor Department embarked on a campaign to convince women to relinquish their jobs to make room for the newly returned veterans and other "necessary" workers. As part of its 18-point program for "transition to a peacetime economy," the Labor Department set out to "retir[e]" women who were merely pin-money workers and come into the labor market only because of the war need, in order to make opportunity for girls who must work regularly." Ravalt, The Equal Rights Amendment and the Draft, National Business Women (November 1972), citing the New York Times, June 2, 1944, p. 10 (quoted in B. Babcock, A. Freedman, E. Norton, S. Ross, *Sex Discrimination and the Law*, 260 (1973) (hereinafter "Babcock").

Johnson Controls' policy causes the same adverse economic consequences for women brought about by protective labor laws. [21]/ Social reformers who supported such laws sought to improve women's lot; however, "special" laws for women reinforced stereotypes of women as wives and mothers, and devalued their importance as wage-earners. [22]/ In addition to solidifying gender segregation in the workplace, protective legislation effectively excluded women from "male" occupations and from promotion opportunities, [23]/ depressed wages in women-intensive jobs, [24]/ and limited women's earning capacity. [25]/ Even with the aid of Title VII and other legislation, women today are far from achieving economic parity with men. [26]/

21/ It is no accident that employer policies excluding women based on reproductive capacity arise in industries in which women's labor is perceived as expendable. Becker, *From* Muller *v.* Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1237-38 (1986). As Becker points out, employers have an economic incentive for perpetuating the marginality of women workers in traditionally male industries. Hiring women often requires making accommodations that cost money, and men are frequently hostile to nontraditional women workers. *Id.* at 1240. Jobs for which women are considered marginal often offer better wages and benefits than jobs in women-intensive industries. It is thus ironic that fetal "protection" policies are most likely to arise "only when the dangerous job offers a real advantage to the women and their living and potential children." *Id.* at 1243.

22/ A. Kessler-Harris, *Out to Work* at 180, 184-185 (1982) (hereinafter "Kessler-Harris"); Baer, *supra* note 9, at 95; Babcock, *supra* note 20, at 27-35.

23/ E.F. Baker, "*Protective Labor Legislation*" 116 Col. U. Studies in Hist., Econ., and Pub. L. 201, 554, 564, 625-26. According to a 1967 survey of 78 companies, 18% of respondents reported that they did not hire women because of state protective laws. Bureau of National Affairs, Personnel Policies Forum, Survey No. 80, Sex and Title VII (April 1967), p. 7.

24/ M. Landes, *The Effect of State Maximum Hours Laws on the Employment of Women in 1920*, 88 J. of Pol. Econ. 476 (1980).

25/ Kessler-Harris, *supra* note 22, at 190, 193-94.

26/ *See* Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Fact Sheet No. 88-2, *Facts on Women Workers* (1988).

The *Muller* decision did not take into account women's individual interests at all, because it simply assumed that women's interests and those of "the race," were identical, just as it assumed that "women" were synonymous with "mothers." 208 U.S. at 421. *Muller* thus "declare[d] that women may be denied rights which men enjoy . . . in the interest of the larger society." [27/] Similarly, the court below discounted women's autonomy interests, noting in passing that "[m]ore is at stake in this case than an individual woman's decision . . ." *Johnson Controls*, 886 F.2d at 897. The court concluded that the burden should fall upon women, but not men, to sacrifice their livelihood to "protect[ ] the offspring of all employees." Id. at 885 (quoting *Hayes* v. *Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984)). However, Title VII requires, and good public policy counsels, that the woman remain the locus of decision-making in weighing the risks and benefits of employment to herself, her dependents, and her potential children. [28/]

In considering whether feasible alternatives existed to Johnson Controls' policy, the Court of Appeals quoted, no fewer than five times, the admonition that "courts are generally less competent than employers to restructure business practices . . ." *Johnson Controls*, 886 F.2d at 892, 893, 897, 901 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)). *Amici* respectfully submit that neither courts nor employers are better situated or more competent than individual women workers to make the decisions that most vitally affect their lives and the lives of their existing and potential families.

27/ Baer, *supra* note 9, at 65.

28/ As discussed earlier, OSHA mandates that men and women in lead exposure positions be provided with information and training, so that they may act responsibly. *See supra* note 19, and accompanying text.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that petitioners' relief be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL BLACK WOMEN'S HEALTH PROJECT AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

(1) Whether a policy which explicitly bars all women of child bearing capacity from employment constitutes a prima facie case of disparate treatment.

(2) Whether the business necessity defense, available to rebut a prima facie case of disparate impact, can be applied to justify overt disparate treatment.

(3) Whether employers have a defense under Title VII that permits them to maintain facially discriminatory policies and unhealthy work environments.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL BLACK WOMEN'S HEALTH PROJECT AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. ("LDF") is a national non-profit corporation formed to assist African Americans in the vindication of their constitutional and civil rights. For many

years LDF has pursued litigation to secure the basic civil and economic rights of low-income black families and individuals. Intentional and unintentional employment practices which discriminate against African Americans have been a primary LDF concern. LDF has also worked on behalf of African Americans struggling with the burden of poor health and discriminatory and inadequate health care services.

LDF is particularly concerned with the growing rates of poverty among African Americans and with the number of single female-headed African American families that are living in poverty. Through its Poverty & Justice Program, LDF is challenging the barriers to economic advancement to help improve the economic status and living conditions of the many in poverty. LDF's Black Women's Employment Program strives to remove obstacles to

employment in occupations where African American women are underrepresented and to provide access to jobs with better wages, decent conditions, and pension and health benefits. Currently, the majority of working African American women are employed in low-paying occupations.

The NATIONAL BLACK WOMEN'S HEALTH PROJECT is a health, education and advocacy organization which works to improve the quality of life for African American women. It works to promote non-discriminatory approaches to insure that all African American women have access to health services, including abortion, that maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

Letters from the parties consenting to the filing of this brief have been filed with the Court.

SUMMARY OF THE ARGUMENT

Amici, supporting petitioners, address two important issues: first, the applicability of settled distinctions in employment discrimination law to fetal protection policies; and second, the impact of such policies on African American workers and their children.

First, it is well established that Title VII of the Civil Rights Act of 1964 prohibits two discrete types of employment discrimination: disparate treatment and disparate impact. Employment policies that are discriminatory on their face -- that is, they distinguish individuals on the basis of their gender -- can be upheld by courts only under extraordinary circumstances: an employer must establish

that sex is a BFOQ, a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. As this Court has recognized, the BFOQ was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. By contrast, cases of disparate impact, involving facially neutral policies or practices, can be answered by a claim of business necessity.

Fetal protection policies which exclude all fertile women from particular jobs in order to prevent possible damage to potential fetuses are facially discriminatory. They classify job applicants and employees by gender and treat individuals differentially on the basis of that classification. Such policies bar the employment of all women of child-bearing capacity, whether or not they are pregnant

or contemplating pregnancy, but do not prohibit the employment of male workers whose reproductive health may also be damaged by workplace hazards.

The Seventh Circuit's application of the business necessity defense to a facially discriminatory fetal protection policy was erroneous, as it blurred the essential difference between disparate treatment and disparate impact cases. This case has the potential to disrupt settled analytic standards and to dilute legal protections against employment discrimination. Employers with potentially hazardous work environments should not be allowed to deny employment opportunities to a class of workers who are believed to be at greater risk in a hazardous environment because of gender or genetic make-up, but, instead, should be required to protect the health and safety of all workers.

Second, African American workers are overrepresented in industries and occupations that pose significant health and safety hazards. Reductions in health and safety protections for workers, which that may result if employers are allowed to evade their responsibility to make workplaces safe for all employees, will disproportionately adversely effect African Americans.

Moreover, exclusionary policies that restrict employment opportunities for all women will further limit access for low-income women to better-paying jobs, as well as their attendant health and pension benefit programs. Most working poor, female single-headed families, a disproportionate number of whom are African American, face poverty and lack health coverage. No barriers to improving the

economic and health outlook of these families should be permitted.

ARGUMENT

I. AN EXPLICIT CLASSIFICATION BASED ON SEX AND THE CAPACITY TO HAVE CHILDREN IS NOT GENDER NEUTRAL AND CONSTITUTES DISPARATE TREATMENT

A. The Distinct Types of Discrimina- Practices Proscribed in §703(a)

Title VII forbids two types of employment discrimination. The first, disparate treatment, both overt or facial and covert or pretextual, is prohibited by §703(a)(1) of Title VII.[1] "'Disparate

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[1] The statutory proscription against discriminatory treatment states:

> It shall be an unlawful employment practice for an employer:
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> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

treatment'...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.'" International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

"A disparate impact claim," on the other hand, "reflects the language of §703(a)(2)."[2] Connecticut v. Teal, 457 U.S.

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§703(a) of Title VII, 42 U.S.C. §2000e-2(a).

[2] The statutory proscription against discriminatory impact states:

> It shall be an unlawful employment practice for an employer:
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> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

440, 448 (1982). Claims of disparate impact "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n. 15.

Although the §703 framework evinces no intent to restrict plaintiffs to one of the two provisions as an exclusive remedy,[3]

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§703(a) of Title VII, 42 U.S.C. §2000e-2(a).

[3] Several lower courts have held that plaintiffs may also bring disparate impact challenges under §703(a)(1). See, e.g., Colby v. J.C. Penney Co., 811 F.2d 1119, 1127 (7th Cir. 1987); Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977)(The Court "need not decide whether ...it is necessary to prove

the statutory language clearly encompasses two distinct forms of discrimination: disparate treatment and disparate impact.

The Court has applied §703(a)(1) in a variety of circumstances involving disparate treatment. See, e.g., Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (direct evidence of a policy of disparate treatment); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (individual disparate treatment); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (pattern or practice of disparate treatment). The standard for evidentiary analysis applied in these cases depends upon the existence of direct evidence of discriminatory treatment. Where direct evidence is absent, the

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intent to establish a prima facie violation of §703(a)(1).").

plaintiff must establish a prima facie case through circumstantial evidence. See McDonnell Douglas, 411 U.S. at 802. "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). By contrast, "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Thurston, 469 U.S. at 121.

An employment policy or practice is established as facially discriminatory, without further need to show a discriminatory intent, where plaintiff's direct evidence of discrimination is accepted. Arizona Governing Committee v.

Norris, 463 U.S. 1073, 1084 (1983) (retirement plan paying lower benefits to women than to men is facially discriminatory); Manhart, 435 U.S. at 708 (policy requiring female employees to make larger contributions to pension fund than male employees is facially discriminatory); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (policy of hiring men but not women with pre-school age children is facially discriminatory); Thurston, 469 U.S. at 121 (policy conditioning transfer rights on age of airline captains is facially discriminatory).

B. An Employment Policy Which Explicitly Classifies Applicants and Employees According To Gender And Capacity To Have Children Is Facially Discriminatory Under §§703(a)(1) and 701(k)

"Section 703(a) of the Civil Rights Act of 1964 requires that persons of like

qualifications be given employment opportunities irrespective of their sex." Phillips, 400 U.S. at 544. "It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." Manhart, 435 U.S. at 708.

Demonstration that an employer openly differentiates between male and female applicants or employees is direct evidence of discrimination. As such, an employment policy which is written with an explicit reference to gender and applies to all individuals of one sex and not the other has always been held to be facially discriminatory. See Norris, 463 U.S. at 1084 (benefit levels based on gender); Manhart, 435 U.S. at 708 (contribution requirement based on gender); Phillips, 400 U.S. at 544 (separate hiring policies for women having pre-school children and for

men similarly situated). As this Court has stated, "Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." Manhart, 435 U.S. at 709.

"Fetal protection policies," such as the hiring policy at issue in the present case, explicitly classify applicants and employees by gender. These policies require that female applicants -- but not males -- offer proof of sterility. Employers thus explicitly categorize prospective and current employees by sex despite abundant evidence that toxic exposure in the workplace poses a health hazard to the potential offspring of both male and female workers.[4] See 43 Fed.Reg.

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[4] In addition, employers justify the employment policy in a facially discriminatory way: the stated intention of the policy is to protect not only

male and female workers.[4] See 43 Fed.Reg. 52953, 52966 (1978) (Occupational Safety and Health Administration, OSHA, finding that "male workers may be adversely effected [sic] by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy."); United Steelworkers of America, etc. v. Marshall, 647 F.2d 1189, 1257 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (OSHA found "abundant support" for view that lead exposure presents health risks to offspring of male

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[4] In addition, employers justify the employment policy in a facially discriminatory way: the stated intention of the policy is to protect not only potential offspring but also "their mothers." The risk of harm to potential fathers is not granted similar consideration. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, at 884 n.25 (7th Cir. 1989).

and female workers and, thus, the standard for lead exposure must protect reproductive capacities of both sexes). See also Staff of House Comm. on Ed. and Labor, 01st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, at 7-9 (Comm. Print 1990); Chris Winder, "Reproductive and Chromosomal Effects of Occupational Exposure to Lead in the Male," 3 Reproductive Toxicology 221 (1989).

Employment policies that differentiate between males and females for the purpose of evaluating the risk of damage to potential offspring are based on unwarranted assumptions and stereotypes about class characteristics: such gender-based classifications are simultaneously underinclusive, since lead exposure increases reproductive risks for both male and female workers, and overbroad, by

encompassing all female employees, even though most women in an industrial labor force do not become pregnant. Johnson Controls, 886 F.2d at 913 (Easterbrook, J., dissenting). These explicit gender-based policies are indeed founded upon discriminatory assumptions about the relevance of physical differences. They improperly impute to every individual female generalizations about risks to fetal health posed by the class of females as a whole. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Manhart, 435 U.S. at 708.

In 1978, Congress amended the Civil Rights Act of 1964 to clarify its intent that gender distinctions based on "pregnancy, childbirth, or related medical conditions" are also prohibited by Title VII.

§ 701(k) of Title VII provides, in part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. §2000e(k)(emphasis added). Congress thus esta-blished that differential treatment of pregnancy is gender-based discrimination. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). The legislative history of this amendment to Title VII makes clear that distinctions based on the child-bearing capacity of women constitute sex discrimination. H.R. Rep. 948, 95th Cong., 2nd Sess. at 2, 5, 6, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4750,

4753, 4754. Thus, explicit classifications based on the capacity to become pregnant, even though they are based on real physical differences between men and women, are proscribed by Title VII.

Despite the fact that Johnson Controls' fetal protection policy is facially discriminatory, the Seventh Circuit failed to apply the analytic framework appropriate for cases of disparate treatment. The court's "flexible" approach to claims of overt discrimination, see Johnson Controls, 886 F.2d at 883, threatens to dilute protection against the most egregious forms of employment discrimination, including explicit classifications on the basis of race.[5] At least one major company has

[5] Significantly, facial discrimination on the basis of race is simply impermissible: the BFOQ exception to the prohibition of such discrimination is not available to defend racial classifications. See §703(e) of Title VII, 42 U.S.C. 2000e-2(e) (defense limited to "those certain instances where religion, sex, or national origin is a bona fide occupational qualification...."). Application of the business necessity defense to claims of facial and intentional discrimination would turn the clock back on employment discrimination law by allowing a defense for explicit racial classifications.

adopted a workplace screening and hiring policy that classified applicants and employees on the basis of race. The rationale is analogous to that used for fetal protection policies: because of group differences, specifically a greater incidence of sickle cell trait, particular workplace hazards pose heightened risks to the health of African Americans. Although it is generally accepted that the trait for sickle-cell anemia is harmless, the Du Pont Company adopted a policy designed to reduce health risks by screening all group members for the sickle cell trait and, then, by

excluding all individuals with the trait from jobs involving exposure to hazardous substances. See R. Severo, "The Genetic Barrier: Job Benefit or Job Bias," The New York Times Feb. 3, 4, 5, 6, 1980, reprinted 1980 by Womens Occupational Health Resources Center, Columbia Univ. This Court should not countenance a decision which disregards the basic distinction between disparate treatment and disparate impact cases that has guided twenty-five years of Title VII jurisprudence and provided protection against employment policies that would classify individuals on the basis of group membership.

II. STATUTORY LANGUAGE, THE STANDARD OF EVIDENTIARY ANALYSIS DEVELOPED BY THE COURT, AND ADMINISTRATIVE INTERPRETATION DEMONSTRATE THAT A CASE OF DISPARATE TREATMENT CAN ONLY BE OVERCOME BY THE ESTABLISHMENT OF A BONA FIDE OCCUPATIONAL QUALIFICATION

Title VII prohibits discrimination on the basis of gender unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." §703(e) of Title VII, 42 U.S.C. 2000e-2(e). The Bona Fide Occupational Qualification (BFOQ) "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

When an employer asserts that gender is a bona fide occupational qualification, the employer has the burden of persuasion. Price Waterhouse v. Hopkins, 490 U.S. __,

104 L.Ed.2d 268, 287 (1989). The employer must demonstrate, first, that the occupational qualification is "reasonably necessary to the normal operation of [the] particular business. Second, "[t]he principle of nondiscrimination" requires that the employer show that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969).

The Pregnancy Discrimination Act explicitly defined the standard to be applied in cases of gender discrimination involving the capacity of women to bear children: a showing of disparate treatment can be overcome only by a showing that female employees differ from others "in their ability or inability to work." §701(k) of Title VII, 42 U.S.C. 2000e(k).

By contrast, business necessity can be asserted to justify facially neutral practices that have an adverse impact on members of a protected class. This Court recently stated the relevant query: "[in] a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Wards Cove Packing Co. v. Atonio, 490 U.S. __, 104 L.Ed. 733, 752 (1989).

Business necessity has never been a defense to overt discrimination. The Seventh Circuit's adoption of the business necessity defense in this case was an attempt to circumvent the requirements of the BFOQ defense. The California Court of Appeal which also considered Johnson Controls' fetal protection policy expressly disagreed with and declined to follow the

reasoning of the Seventh Circuit. The state court properly found the employment policy facially discriminatory and concluded that only the BFOQ defense applied. "The fact that it may be difficult for the employer to meet the BFOQ standard in a [fetal protection policy] situation is a concern of the legislature." Johnson Controls, Inc. v. California Fair Employment and Housing Commission, 218 Cal.App.3d 517 (1990) at 37. To adopt the business necessity defense in this context is to "champion an analysis which holds that overt, facial discrimination creates only a presumption of discrimination." Id. at 39.

Administrative interpretation of Title VII also supports the position that only the demonstration of a BFOQ can overcome a case of disparate treatment. An Equal Employment Opportunity Commission internal

policy guidance issued after the Seventh Circuit's Johnson Controls decision stated that fetal protection policies which exclude only women constitute per se violations of Title VII.[6] "For the

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[6] Although the EEOC's statements regarding the proper analytic framework for review of fetal protection policies have not been consistent, see Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s (Comm. Print 1990), it is significant that on January 24, 1990, the Commission released a guidance in which it took issue with the Seventh Circuit's Johnson Controls decision and expressly instructed EEOC staff to disregard the court's opinion. EEOC Policy Guidance on United Auto Workers v. Johnson Controls, Inc. Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). This recent statement takes a clear position. In contrast, the Commission's earlier guidance, quoted at length by the Seventh Circuit, was merely interpretive. The 1988 guidance was limited to the elaboration of the framework suggested by existing judicial interpretations. See EEOC Policy Guidance on Reproductive and Fetal Hazards Daily Lab. Rep. (BNA) No. 193 at D-1 (October 5, 1988); see also Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s (Comm. Print 1990), at 22-23.

plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." EEOC Policy Guidance on Auto Workers v. Johnson Controls, Inc. Daily Lab. Rep. (BNA) No. 18, at D-1 (January 26, 1990). The Commission found the application of the more narrow BFOQ defense "consistent with Title VII's structure and purpose." Id.

Employers simply should not be permitted to implement policies that infringe on the right to fair employment. The relaxation of standards allowed by the Seventh Circuit is a dangerous precedent - with consequences that extend well beyond the context of fetal protection policies. Employment discrimination law prohibits, and should continue to prohibit, the wholesale exclusion of a class of people from the workplace. Categorical exclusion

cannot be justified by the belief that some individuals within the class may be particularly susceptible to the harmful effects of toxic substances. Title VII does not allow employers to institute policies that sacrifice women's employment opportunities instead of cleaning dirty workplaces.

III. UNHEALTHY WORKPLACES DISPROPORTIONATELY ADVERSELY AFFECT AFRICAN AMERICAN WORKERS BECAUSE THEY ARE OVERREPRESENTED IN DIRTY INDUSTRIES AND JOBS

Unhealthy work environments will disproportionately adversely affect the health status of African American workers. Historic job discrimination and poor training and education have combined to concentrate African American workers, both men and women, in unhealthy industries and in the most hazardous jobs. Policies which allow employers to exclude women, rather than require a clean and safe work

environment for all workers, will have particularly devastating effects on African Americans.

In general, African Americans are overrepresented in laundry and dry cleaning, tobacco manufacture, fabric mills, smelters, hospitals and service industries. Within these industries, African Americans also tend to be concentrated in the dirtiest jobs, such as coke ovens, which are usually tended by African American steelworkers, and opening, picking and sorting operations in textile mills.[7]

Furthermore, migrant farm workers, estimated to be 75 percent Chicano and 20 percent African American, have among the

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[7] Pollack and Grozuczak, Reagan, Toxics and Minorities, Urban Environment Conference c/o United Steelworkers of America 2 (1984) (hereinafter cited as Reagan, Toxics)

most dangerous and least protected jobs of all workers.[8] Their exposure to pesticides, heat, mechanical hazards, noise and dust, combine with poverty and poor medical care to lower the life expectancy of a farmworker to 49 years, more than 20 years less than the national average.[9]

A. The Overall Health Status of African American Workers Is Affected by Toxic Work Environments

When compared with whites, the health indices of African Americans are alarmingly

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[8] In a 1969 study of Florida agricultural workers exposed to pesticides, it was found that African Americans were assigned mostly to mixing, formulating, and spraying of organophosphate-type pesticides, considered to be the most hazardous operations. In the study, African Americans working in formulating had the highest rates of pesticide-induced liver and renal (kidney) dysfunction. Davis, The Impact of Workplace Health and Safety on Black Workers: Assessment and Prognosis, 31 Lab. L.J. 723, 729 and n. 31 (1980) (hereinafter cited as Impact).

[9] Reagan, Toxics at 41.

poor.[10] Work force environment cannot be ignored as a source of the disparity, as many studies have shown.

In an article focusing on the impact of workplace health and safety on African American workers, the author concludes that:

> [I]llness, disease, and death has continued to take its toll among black workers, due to unchecked hazardous working conditions and exposure to toxic substances....

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[10] There has been a longstanding disparity in the health status of African Americans when compared to whites. Life expectancy at birth for white males in 1982 was 71.5 years; for African American males, it was 64.9 years. U.S. Dept. of Health and Human Services, Report of the Secretary's Task Force on Black & Minority Health, Vol I., at 64 (1985). In 1986, the death rate from all causes, per 100,000 population was: for all races 541.7; for white men 679.8; for African American men 1,028.9; for white women 387.7; for African American women 588.2. National Center for Health Statistics, U.S. Dep't of Health and Human Services, Pub. No. (PHS) 89-1232, Health, United States, 1988, at 62-63 (1989) (hereinafter cited as Health, United States)

> Fifteen percent of the black work force (one to one and one-half million) are unable to work due to permanent or partial job-related disabilities. Black workers have a 37 percent greater chance than whites of suffering an occupational injury or illness. Black workers are one and one-half times more likely than whites to be severely disabled from job injuries and illness and face a 20 percent greater chance than whites of dying from job-related injuries and illnesses.[11]

Even with these known statistics and public recognition of the poor health indices of African Americans, there is no concerted effort to identify and remove hazardous conditions in the workplace. Fetal protection policies further remove from public debate the important question of the responsibility of federal and state governments for ensuring worker safety and for requiring employers to provide healthy

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[11] Impact at 724 (footnotes omitted).

work environments for all workers. The impact of unhealthy environments, particularly with lead, is felt by men, women and children, and its devastating effects are felt disproportionately by African Americans.

1. Lead poses hazards for workers and poor urban children

Lead exposure poses serious health hazards for workers, as well as for poor, urban children. Found in paint, gasoline, food and food containers, lead causes disabling illness and brain damage, which can lead to lowered intelligence, erratic behavior and poor classroom performance in children. A study of blood lead levels found that the mean levels of blood lead were higher in African Americans than whites across all ages. It also found that within the central cities, the mean blood lead levels in African American children

were significantly higher than in white children.[12] Eleven percent of all inner-city children, 12% of African American children and over 18% of poor African American children possess dangerous blood lead levels.[13]

Effective regulation, particularly of leaded gasoline and leaded paint -- the two sources most commonly responsible for childhood lead poisoning -- can reduce lead exposure dramatically. Programs to identify and provide medical help to affected children can check and even reverse the symptoms of lead poisoning. During the 1970s several federally-funded programs addressed the problem of exposure to lead. Blood levels fell nationally

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[12] Mahaffey, et al., National Estimates of Blood Lead Levels: United States, 1976-1980, 307 New Eng.J. of Medicine 573, 575-76 (1982).

[13] Reagan, Toxics at 6 & n. 5.

during the 1970s, although greater improvement was seen for whites than for African Americans.[14] Such progress came to a halt in the 1980s.

Lead poisoning is a problem not only for urban children but also for adult African American workers. Many African American workers are employed in battery plants and lead smelters. For example, a sample of eight battery plants and lead smelters found that 52 percent of all blue collar jobs were held by non-whites. In one particular plant, all 42 of the workers - most of whom were African American - had lead poisoning.[15] Overall, approximately 835,000 workers in 120 occupations are exposed to lead on the job.[16]

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[14] Reagan, Toxics at 7.

[15] Reagan, Toxics at 11.

[16] Reagan, Toxics at 11.

Additional risks from exposure to lead and other dangerous substances are found in the homes of lead workers. Studies of families of lead, asbestos and beryllium workers have found that contamination of the home environment through such means as soiled work clothes may be associated with elevated disease levels in the families of the workers.[17] Regulation of workplace environments can reduce these unnecessary risks.

2. Occupational exposures to toxic substances can cause cancer

Fetal protection policies typically have been adopted in male-dominated, blue collar industries, without regard to the

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[17] Mullings, "Minority Women, Work, and Health," in Double Exposure: Women's Health Hazards on the Job and At Home 121, 130 and n. 63 (W. Chavkin, ed. 1984) (hereinafter cited as "Minority Women").

health of exposed male workers.[18] Many employers have instituted policies which exclude women from jobs which require exposure to hazardous substances, conditions, or physical agents, allegedly out of concern for fetal health.[19] In fact, some fetal protection policies exclude only fertile women from workplace hazards despite evidence that the hazard in question poses other non-reproductive health risks. Many workplace hazards which may pose fetal health risks also pose other

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[18] See, M. Paul, C. Daniels, and R. Rosofsky, Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am.J. of Indus. Medicine 267, 273 (1989) (restrictive practices more common among firms with male-intensive or evenly-proportioned production work forces than among those employing predominantly females).

[19] See, J. Bertin, "Reproductive Hazards in the Workplace" in Reproductive Laws for the 1990s: A Briefing Handbook 207-232 (N. Taub and S. Cohen, eds. 1989).

serious health risks to male and female workers.[20]

For example, occupational cancer may account for a significant portion of the increase in cancer rates among African Americans. The death rate among African Americans from lung cancer is about 20 times what it was 40 years ago. African Americans have worked with asbestos, benzene, coke oven emissions, arsenic, vinyl chloride and trichloroethylene, together with the 1200 chemicals identified by the National Institute for Occupational Safety and Health which induced tumors in animals. These exposures began to occur during the early 1900s large numbers of

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[20] Staff of House Comm. on Ed. and Labor, 101st Cong., 2d Sess., Report on The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, at 8, & n. 19 (Comm. Print 1990), ("toxic agents that affect reproductive health are likely to have other health effects as well.")

African Americans migrated from the South to urban industrial areas and entered the most strenuous and hazardous jobs in steel and automotive manufacturing.

A study of over 6,500 rubber workers in Ohio found that African American workers were concentrated in the more dangerous compounding and mixing areas. Twenty-seven percent of the African American workers in the study population, but only three percent of the white workers, had worked in this area of the plant.[21]

A study of coke plant steelworkers revealed that 89 percent of nonwhite coke plant workers were employed at the coke ovens while only 32 percent of white

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[21] Impact at 726-28 & n. 19. The five-year cancer survival rate for cancer of the prostate gland is 73.4% for white males and 62.8% for African American males. Health, United States at 92.

workers were employed in that capacity.[22] A cancer study of 59,000 steelworkers, comprising 62 percent of all U.S. males working in basic steel production, found twice the expected death rate from malignant neoplasms among nonwhite workers employed in the coke plant.[23] The study also found that the excess deaths for nonwhite coke plant workers was caused by cancer of the respiratory system. Twenty-five deaths from this cause were observed

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[22] Impact at 728 & n. 24.

[23] "One main area of hazardous exposures within the steel industry is the coke oven operation. The main function of this process is to produce metallurgical coke for use at the blast furnaces. Another function of this process is to recover chemical byproducts during the transformation of bituminous coal into coke. This process releases dangerous gases and dust particles, including the carcinogen Benzo (a) Pyrene." Impact, at 727. In 1986, the death rate from malignant neoplasms among white males was 158.8 deaths per 100,000, while among African American males it was 229.0. Health, United States at 62.

among nonwhite steelworkers employed at least five years in the coke plant, whereas only 7.3 of these cancer deaths would have been expected. Notably, the number of deaths for whites employed in this area was seven, with 8.4 having been expected.[24]

3. Textile workers suffer from Brown Lung and respiratory diseases

Studies of textile industry workers have shown disproportionate rates of respiratory disease, from byssinosis (Brown Lung), chronic bronchitis, and breathlessness among African Americans in high dust areas such as opening, picking, and carding operations.[25] More than a half million workers are employed in the cotton agriculture and yarn and fabric manufacture industries. Thirty thousand active and

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[24] Impact at 728 & n. 23.

[25] Impact at 729 & n. 30.

retired workers already suffer from Brown Lung, which is caused by exposure to cotton dust in inadequately ventilated work environments; 800 workers are completely disabled from the disease annually.

Cotton dust exposure is a health problem for African American workers: an average of 25 percent of textile workers, and as many as 60 percent in some areas, are African Americans.[26] In 1980, 57 percent of the 240,000 textile workers were women, while 20.7 percent of all operatives and 13.8 percent of all sewers and stitchers were African American women.[27]

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[26] Reagan Toxics at 33 & n. 9.

[27] "Minority Women" at 129 & nn. 49, 50.

B. The Health Status of African American Women Workers Is Adversely Affected by The Hazardous Work Conditions Found in Predominantly Female Occupations

Although 17 percent of all service occupations were filled by African Americans in 1987, African Americans, particularly women, filled an overwhelming number of the occupations that utilized toxic substances in the workplace. African Americans comprised over 34 percent of all cleaners and servants; 31 percent of all nursing aides, orderlies and attendants; 30 percent of maids and housemen; and 23 percent of all private household workers.[28]

While African American women represented 5.4 percent of the total labor force in 1981, they constituted 24 percent of all nursing aides, 19 percent of all

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[28] Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 1989, at 389.

practical nurses, 16 percent of all health aides and 16 percent of all other health service workers.[29] Studies have shown that hospital workers have a generally high level of occupational diseases.[30]

A study of mortality among non-professional New York City hospital service workers, most of whom were African American women, suggests that nonprofessional workers may be at elevated risk for certain types of cancer. The study found particularly high rates of liver cancer among African American men and breast cancer among African American women. While unable to ascribe specific cancers to specific chemicals, the researchers noted

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[29] J. Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies for Change, unpublished paper prepared for the NAACP Legal Defense and Educational Fund, Inc. 93 (1984) (hereinafter cited as Low Wage Black Women).

[30] "Minority Women" at 127 & n. 36.

that hospital workers are constantly exposed to ionizing radiation, anesthetic gases, benzene, ethylere oxide, formaldehyde, and alkylating agents - substances that have been linked to cancer. The study also questioned whether an excess of liver cancer among health service workers is associated with exposure to Hepatitis B virus, as a consequence of job-related activities such as cleaning, handling of patients' laundry, and other contact.[31]

Skin irritation and disease are widespread among hospital workers, service workers, and industrial workers.[32] Skin disease is the leading industrial disease in the United States today.[33] Industrial

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[31] "Minority Women" at 127 and n.38.

[32] J. Mager Stellman, Women's Work, Women's Health 82 (1977) (hereinafter cited as Women's Work).

[33] Women's Work at 121.

chemicals and cleaning solvents used by service workers can dissolve the wax in the skin, resulting in different degrees of skin irritations, or dermatitis. A comparatively large number of industrial chemicals can lead to the formation of skin growths, which may be either cancerous or benign.[34] One survey of patients with occupational dermatitis found that hospital work and cleaning accounted for 55 percent of all cases.[35]

Domestic workers use home-cleaning products daily, yet there is almost no product safety information available about them. In fact, the average household has as many as 250 chemicals which, if ingested, could send a child to the

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[34] Women's Work at 122-124.

[35] Women's Work at 124.

hospital.[36] Insecticides also pose a health hazard to domestic workers.[37] A 1981 U.S. National Research Council report suggests that better ways must be devised to reduce exposure to indoor contaminants. This is especially crucial for domestic workers who face long-term, low-level exposure to potential cancer-causing substances, or to contaminants that may cause respiratory infection and cardiovascular disease.[38]

Most low-wage African American women are found in service and operative jobs that put them at particular risk. In 1981, one in seven African American women worked as an operative. African American women

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[36] Rosenberg, "The Home is the Workplace" in Double Exposure 229 (W. Chavkin, ed. 1984) (hereinafter cited as "The Home is the Workplace").

[37] "The Home is the Workplace" at 233.

[38] "The Home is the Workplace" at 234-35.

represented 31 percent of all clothing ironers and pressers and 20 percent of laundry and dry cleaning operators.[39] Once again, African American workers tend to be concentrated in the dirtiest jobs within an industry. A study of laundry and drycleaning workers found that African American male and female death rates, from all causes, doubled those of white workers. In addition, the study showed that African Americans had higher death rates from cancer of the liver, lung, cervix, uterus and skin.[40]

Thirty percent of African American women workers are clerical workers.[41] Increasingly, young African American women are avoiding private household and service

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[39] Low Wage Black Women at 95.

[40] The Impact at 728 & n. 26.

[41] Low Wage Black Women at 77.

jobs - areas that have employed large numbers of older African American women - and moving into clerical jobs.[42]

The hazards of clerical work include muscular and circulatory disorders, fatigue, and exposure to dangerous chemicals such as benzene, toluene, and other organic solvents.[43]

Clerical workers also appear to be vulnerable to stress-related diseases. A study which found increased risk of coronary heart disease among clerical workers, examined the relationship of employment status and employment-related behaviors. The results of the study appear to show that an increased risk of coronary heart disease is related to features of the

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[42] Women's Bureau, U.S. Dep't of Labor, Bulletin 298, Time of Change: 1983 Handbook on Women Workers 63 (1983) (hereinafter cited as Time of Change).

[43] "Minority Women" at 128.

work environment, including lack of control and autonomy, nonsupportive relationships and limited physical mobility.[44] African Americans tend to be overrepresented among the lowest level of clerical workers -- file clerks, clerical assistants, typists, and telephone clerks[45] -- jobs that are often subject to speed-up, isolation and lack of job mobility.[46]

In sum, any policies which permit employers to avoid their duty to provide safe and clean working environments for all workers will have doubly devastating effects on African American workers who are disproportionately represented in the dirtiest jobs and the most hazardous industries. Health indices of African

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[44] "Minority Women" at 128.

[45] Low Wage Black Women at 96.

[46] "Minority Women" at 128.

Americans will continue to lag behind white Americans if employers are allowed to evade their responsibility for the toxic work environments that help to cause poor health outcomes.

It is unconscionable for OSHA and the medical research community and employers to focus on genetics and the behavioral and social characteristics of African Americans which may contribute to poor health status without also focusing on occupational exposures to toxic substances. Regulatory agencies have abdicated their responsibility for protecting the lives and health of Americans, especially African American workers and families.[47] Without more balanced analysis, no significant improvement in the health indices of African Americans should be expected.

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[47] See, Impact at 730; Reagan, Toxics at 57 and Preface.

IV. EXCLUDING ALL POTENTIALLY PREGNANT WOMEN FROM CERTAIN BETTER-PAYING JOBS WILL PLACE AFRICAN AMERICAN FAMILIES AT GREATER RISK OF POVERTY AND POOR HEALTH

As Judge Easterbrook cogently notes in his dissent in Johnson Controls, "rigorous implementation of fetal protection policies could close more than 20 million jobs to women...." UAW v. Johnson Controls, 886 F.2d 871, 914 and n.7 (7th Cir. 1989). African American women, who are already overrepresented in lower-paying industries and occupations, cannot afford to be excluded from participating in any occupation with growth potential and higher pay.

A. Women's Earnings Support Their Families

The wages of African American women contribute significantly to the earnings level of African American families. The median African American family income in

1985 was $24,570 for a married couple family. Median family income depended on whether the woman in the marriage worked: $30,502, if she was in the labor force and $15,129 if she was not. In contrast, whites had a median income of $36,992 if the wife worked, and $25,307 if the wife did not work.[48]

Among white, African American and Hispanic children, African American children were the most likely to have a mother who worked full time throughout the year, while white children were the most likely to have a mother who was employed less than full time, full year.[49] Seventy-

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[48] H. Pipes McAdoo, Changes in the Formation and Structure of Black Families: The Impact on Black Women 15 (Wellesley College Center for Research on Women, Working Paper No. 182, 1988) (hereinafter cited as Pipes McAdoo, Changes)

[49] Select Comm. on Children, Youth and Families, U.S. House of Representatives, 100th Cong., 1st Sess., U.S. Children and Their Families: Current Conditions and Recent Trends, 1987, at 13 (1987) (hereinafter cited as U.S. Children).

five percent of African American mothers with children under age 18 were in the labor force, compared to only 60 percent of white mothers with children under 18. Among women maintaining families alone, 62 percent of African American mothers with children under 18 were in the labor force, compared to 73 percent of white single mothers.[50]

The poverty rate for African Americans is abysmally high: 12.2 percent for married families; 22.9 percent for male householders; and a phenomenal 50.5 percent for female householders with no male present.[51] Most African American single mothers are in the work force but are unable to earn

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[50] U.S. Children at 20.

[51] H. Pipes McAdoo, Changes at 15.

sufficient wages to raise their family income level above poverty. In 1984, of 3,740,000 African American female-headed families, 57 percent had mothers in the labor force; 49% of these working mothers earned below $20,000; 21 percent earned below $7,000.[52]

Women who have principal responsibility for maintaining their own families are generally poor. They are more likely than other families to have only one earner, and to have preschool children who restrict labor force activity.[53] Whether

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[52] Comparable figures for white female-headed families: 68 percent had mothers in the labor force; 52 percent earned below $20,000 and 16 percent earned below $7,000. Children's Defense Fund, Black and White Children in America: Key Facts 122 (1985) (hereinafter cited as Key Facts).

[53] Time of Change at 25.

African American or white, young mothers under age 25 are very likely to be poor.[54]

African American women, on average, earn 56 cents for every dollar earned by white men.[55] African American women with college degrees earn a median income less than the median income of white males with eighth grade education.[56] Wage inequities particularly burden African American women who tend to be clustered in narrow bands of low-skilled jobs in occupational categories that are predominantly filled with women. It has been estimated that in 1981, more than 70 percent of all working African

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[54] Key Facts at 53.

[55] B. Thornton Dill, L. Weber Cannon, R. Vanneman, Pay Equity: An Issue of Race, Ethnicity and Sex 1 (National Committee on Pay Equity 1987).

[56] In 1982, college educated African American women had a median income of $16,183, while white males with an eighth grade education had a median income of $16,773. Key Facts at 62.

American women were employed in low-wage service, clerical, private household, retail sales and nondurable goods operatives jobs.[57]

B. Most Low-Wage Jobs Lack Employer-Provided Health Coverage

Most low-wage jobs in which African American women are overrepresented do not offer employer-provided benefit programs, including pensions and health coverage, particularly for dependent children.[58] Health care financing for Americans under age 65 is principally provided by employers. However, since 1980, employer-provided insurance for both catastrophic and routine care has become increasingly unavailable. The number of uninsured

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[57] Low Wage Black Women at 12.

[58] See, U.S. Commission on Civil Rights, Health Insurance: Coverage and Employment Opportunities for Minorities and Women, Clearinghouse Publication 72 (1982).

Americans rose by one-fifth, from 30.9 million in 1980 to 37.1 million in 1987.[59]

By 1986, one out of three children living in families in which at least one family member was employed had no coverage under an employer plan. By contrast, about half (50.7 percent) of African American children in such families were not covered.[60] Among children living in moderate-income families (those with incomes between 200 and 400 percent of the federal poverty level), the racial disparity is even more alarming. While 80.9 percent of white children in working moderate-income families had employer coverage in 1986, only 69.6 percent of

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[59] Children's Defense Fund, A Vision for America's Future 8 (1989) (hereinafter cited as A Vision).

[60] A Vision at 9.

comparably situated African American children were similarly protected.[61]

Having no health insurance places the existing children of African American working mothers in immediate peril. In fact, this lack of coverage and access to care may be more harmful than the potential hazard to uncontemplated future offspring posed by working in a job which may involve exposure to hazardous substances. Employers implementing fetal protection policies are trading off health risks and placing the health of existing children - and the stability of their families - in jeopardy.

One measurement of the health of a nation is its infant mortality rate. The United States' infant mortality rate was 10.4 deaths per 1,000 live births in 1986, placing it eighteenth in the world. The

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[61] A Vision at 9.

rate among African American infants was 18.0 deaths per 1,000 live births, which on its own, would rank the United States twenty-eighth in the world.[62]

The percentage of births to women who received prenatal care early in pregnancy has dropped three times in the 1980s -- most recently between 1985 and 1986, when it fell from 76.2 percent to 75.9 percent. If the very slow overall rate of progress made during the 1978-1986 period continues until the year 2000, one out of every five births (and more than one-third of African American births) will be to a woman who failed to receive this crucial care early in pregnancy.[63] Children born to women who fail to receive prenatal care are three times more likely to die in infancy than

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[62] A Vision at 4.

[63] A Vision at 4.

those whose mothers receive comprehensive care. Babies whose mothers receive inadequate care also are at greater risk of being born at low birthweight, a condition that increases the likelihood of permanent lifelong disabilities.[64]

Unimpeded equal employment opportunities, particularly for jobs with adequate wages, are essential for African American women and their families. Higher paying jobs in manufacturing industries are disappearing. Six of every seven new jobs created between 1979 and 1987 were in the retail trade or service industries -- sectors with the lowest average wage levels. Industries that have been shrinking since 1979 -- such as mining and manufacturing -- paid 42 percent more

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[64] A Vision at 12.

annually than those that were expanding during the same period.[65]

Policies which restrict access to better employment for women will have devastating effects on African American women, a group of Americans who are already hampered by intentional and covert race discrimination in employment, as well as inadequate education and training. African American women need full access to employment that provides a living wage, health and pension benefits, and family security and stability.

CONCLUSION

This case implicates two critical issues. First, the decision of the lower court jeopardizes long-standing principles of employment discrimination law. Distinct judicial approaches to the analyses of

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[65] A Vision at 18.

subtle and overt discrimination have been crucial to the effectiveness of Title VII in reducing the many forms of discrimination which continue to plague the American workplace. To blur these distinctions is to weaken the ability of Title VII to protect against even the most blatant forms of employment discrimination, such as the categorical exclusion of a class from employment opportunities.

Second, this case raises issues of employer responsibility for the maintenance of healthy work environments. As a consequence of disadvantage and discrimination, African American workers are overrepresented in dirty industries and jobs. Employment policies which focus on the danger of workplace hazards to only a particular class of people ignore the larger dimension of the problem and

threaten the health status of those workers who remain on the job.

For the reasons stated above, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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— v. —

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Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BY TRIAL LAWYERS FOR PUBLIC JUSTICE

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS BY TRIAL LAWYERS FOR PUBLIC JUSTICE

INTEREST OF THE AMICUS*

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to using the skills and approaches of plaintiffs' trial lawyers to advance the public good. Supported by and working through a nationwide network of over 750 of the country's outstanding trial lawyers, TLPJ brings precedent-setting and socially significant cases designed to advance consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employee rights, and the protection of the poor and the powerless.

* This brief *amicus curiae* is being filed with the consent of the parties. The parties' written consents are on file with the Clerk of the Court.

TLPJ is particularly interested in this case because it presents the question of whether two battles TLPJ routinely wages - - the battle against sex discrimination and the battle for workplace safety - - will be treated as contradictory or, as Congress mandated, complimentary. In addition, because the majority below decided the issues presented without a trial, this case also presents a question of critical importance to virtually all victims and potential victims of toxic torts: whether courts may simply disregard the results of animal studies and hold that, unless and until enough people have been injured or killed to permit a statistically significant sample to be epidemiologically studied, no inference of causation can properly be drawn.

SUMMARY OF ARGUMENT

While we agree with many of the arguments advanced by the appellants and the other *amici*, there are three fundamental flaws in the decision below that are particularly disturbing. We write separately to stress these three critical, fundamental flaws.

First, both the majority opinion below and, to some extent, Judge Posner's dissent utterly disregard the fact that Johnson Controls' so-called "fetal protection policy" is nothing of the sort. In reality, the policy is only tenuously related to fetal protection and is based on long-discredited stereotypes that trample on women's autonomy. Moreover, the company's assertions of "moral concern" for fetal health are severely undermined by the risks to employee and consumer health that Johnson Controls routinely creates and tolerates.

Second, both the majority opinion below and Judge Posner's dissent seriously err by suggesting that the bona fide occupational qualification ("BFOQ") defense is broad enough to encompass an employer's "ethical, legal, and business concerns about the effects of its activities on third parties" or other "social costs" like potential tort suits by future children of its

employees. The "social costs" related to toxic workplaces are so open-ended that permitting such costs to be evaluated as part of a BFOQ defense would overwhelm Title VII trials with social policy judgments better left to Congress. Furthermore, on this question, Congress has plainly spoken: "social costs" like potential tort liability are not proper components of a Title VII defense.

Third, regardless of whether its interpretation of Title VII is correct, the majority opinion below improperly entered summary judgment in Johnson Controls' favor because it did so in the face of animal studies presented by plaintiffs that showed that the levels of lead exposures from which the company sought to protect women (in the name of protecting fetuses) are also dangerous to men. The majority's wholesale rejection of animal studies is legally and scientifically untenable. Plaintiffs' animal study evidence, without more, requires reversal.

INTRODUCTION

We believe that the Johnson Controls' policy at issue in this case, is, inescapably, overt, facial discrimination on the basis of sex and capacity to become pregnant. Consequently, according to the clear language and intent of Title VII, as amended by the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. 2000e(k), the only defense available to the employer is that lack of capacity to become pregnant is a BFOQ; this defense may only focus on the ability of *substantially all* adult women to perform the work. *Western Air Lines v. Criswell*, 472 U.S. 400 (1985). The arguments we advance in this brief, however, are equally applicable to the business necessity defense. Regardless of whether this Court finds the BFOQ or the business necessity defense to be mandated by Title VII, the majority below erred by granting summary judgment in defendant's favor.

I. JOHNSON CONTROLS' "FETAL PROTECTION POLICY" HAS LITTLE TO DO WITH FETAL PROTECTION AND A LOT TO DO WITH SEX DISCRIMINATION.

The majority opinion below and Judge Posner's dissent, like the decisions in *Wright v. Olin*, 697 F.2d 1172, 1189-90 (4th Cir. 1982), and *Hayes v. Shelby County Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) (general societal interest in having enterprises be protective of health of unborn children provides business necessity for policy excluding women from employment), contort facial Title VII law and utterly disregard the plain language of the PDA.[1] They do so because of well-intentioned concerns about fetal health. To properly evaluate Johnson Control's exclusionary policy, as well as the arguments about the relevance of moral concerns and social costs to Title VII defenses, however, these concerns must be put into perspective.

The admirable concern that our toxic world be made safer for the sake of future generations, when applied to this case, merely obfuscates the fact that the connection between the Johnson Controls policy and the health of babies or fetuses is tenuous and speculative. What is not tenuous or speculative, however, is the immediate harmful impact of the policy on existing human beings, both male and female. Existing women are denied well-paying jobs and advancement opportunities and are branded with the stigma of being regarded as marginal, expendable workers. Existing men are virtually foreclosed from working in the jobs with the lowest levels of lead exposure, both

[1] Commentators who have analyzed *Olin* and *Hayes* are uniformly critical of their reasoning, assumptions, and troubling contortions of Title VII law and precedent. *See, e.g.*, Becker, "From *Muller v. Oregon* to Fetal Vulnerability Policies," 53 *U. Chi. L. Rev.* 1219 (1986); Finley, "The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?," Proceedings of the N.Y.U. Thirty-Eighth Annual Nat'l Conf'c on Labor, Ch. 16 (Mathew Bender & Co. 1985).

because women have been transferred into these jobs and because men's concerns about reproductive health are ridiculed at Johnson Controls.[2]

A. Johnson Controls' Policy is Based on a Web of Speculation About the Number of Women Who Might Get Pregnant and Who Might Have Children Adversely Affected by Lead.

Johnson Controls' designation of its policy as a "fetal protection policy" is a misnomer. The policy applies whether or not a fetus is extant. The women to whom it applies are not pregnant, and many of them have no plans to become pregnant, or are long past their childbearing days, or are responsible users of contraceptives. The policy does not protect fetuses other than in the most indirect, attenuated sense. Rather, what it does do, directly and immediately, is exclude existing adult women from entire job categories and promotion opportunities, simply because women have the biological ability to become pregnant. All of the professed "moral concern" about fetal health boils down to the following chain of reasoning: because women can get pregnant, and because some of them *might* get pregnant, and some of these who get pregnant *might* have high blood lead levels, and then perhaps some of the children born to these women *might* have some developmental problems, in order to avoid this slight possibility, we must refuse to hire *all* women who are physically capable of bearing children.

This major leap - - from the fact that *in utero* lead exposure can cause cognitive development and social adjustment

[2] Donald Penney, one of the named plaintiffs in this case, charged in his E.E.O.C. complaint that his ability to bid for low level lead jobs is greatly restricted by the Johnson Controls' Fetal Protection Policy, since it gives transfer preference to women. He also charged that, when he requested a leave of absence in order to lower his blood lead levels because he wanted to father a child, he was subjected to such a level of harassment as to constitute constructive discharge. J. App. 66-69.

problems in children to the conclusion that all fertile, but not necessarily pregnant, women must be barred from employment - - is fraught with analytic and policy pitfalls.

B. Restricting Women's Employment Opportunities Because of The Capacity of Women to Become Pregnant Has Long Been Discredited as Based on Stereotypes That Trample on Women's Autonomy.

Justification of restrictions on women's employment opportunities because of their capacity to bear children and attendant concern about social cost and the well-being of future generations is the most venerable and prevalent excuse for sex-based employment discrimination. This sad fact was frequently recognized by the proponents of the Pregnancy Discrimination Act. *See, e.g.*, Sen. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977); H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 2-3 (1978). Indeed, the justifications offered by Johnson Controls and by the majority below bear a startling resemblance to the long-discredited turn-of-the-century reasoning in *Muller v. Oregon*, 208 U.S. 412 (1908), in which Chief Justice Brewer, writing for the Court, upheld a statute limiting employment of women, out not men, because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421. And, the restriction was necessary "largely for the benefit of all." *Id.* at 422. Due to the recognition that excluding women in the name of "protecting" them and future generations fails to treat women as autonomous individuals and forever chains them to their reproductive role, state legislation aimed at "protecting" women out of jobs was swept aside by Title VII almost twenty years ago. See, e.g., *Rosenfield v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); J. Baer, *The Chains of Protection* (1978).

It is odd that, in the face of judicial interpretations of Title VII prohibiting state legislation that "protects" only women from occupational hazards, the majority below would allow a private employer to exclude women in the name of protecting potential offspring from the risks of only maternal, but not paternal, employment. Becker, *supra*, 53 *U. Chi. L. Rev.* at 1220. It is also distressing that, with the widespread adoption of fetal protection policies in the last few years, *id.*, women are still, despite the PDA and the long-ago demise of protective legislation, being forced to fight for their right to employment over claims that their childbearing capacity precludes that right. The subtle shift from the reasoning in *Muller* that it was *women* who were being protected, in the name of future generations, to Johnson Controls' reasoning that it is *potential fetuses* that must be protected, does not mask the fact that it is still women who are being excluded from employment.

The historical and contemporary exclusion of women from employment because of their childbearing capacity assumes that women are more socially important because of their reproductive function, and that their value as workers is marginal. In essence, women are reduced to their wombs. Moreover, women are presumed to be less capable and conscientious decision-makers about their reproductive desires and health than employers. Thus, fetal protection policies such as the one implemented by Johnson Controls invariably disrespect women's autonomy and individuality. Policies broadly exclusive of all fertile women callously disregard actual individuals' plans about marriage and childbearing and fail to contemplate that many working women are unlikely to have any more children. Thus, these policies plainly contravene *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), in that they exalt a generalizable biological difference between men and women into an excuse for not treating individual women as individuals.

Moreover, Johnson Controls arrogated to itself the judgment that any woman who did exercise her autonomous right to procreate despite her careful weighing of the risks of lead exposure versus the risks of unemployment and her family's need for her income was acting irresponsibly. Prior to 1982, Johnson Controls did not broadly exclude all women, because the company recognized that "not all women who can become mothers wish to become mothers," and that the decision whether to work in certain jobs "should properly be made by the individual immediately involved." J. App. 140. Yet Johnson Controls regarded its pre-1982 voluntary program, under which employees were informed of the risks and given counseling, a "failure", because, throughout the company's plants, eight women became pregnant in six years. (There is no evidence in the record that any of these women bore a child that showed any adverse effects from prenatal lead exposure.) Rather than regarding the occurrence of a pregnancy as a "failure," as an act engaged in by an irresponsible woman (in consultation with her irresponsible partner), the occurrence of so few pregnancies during such a long period of time at a large, nationwide company indicates the success of the previous policy, and the responsibility of autonomous women.

The insult to women's dignity and autonomy perpetrated by Johnson Controls is illustrated by the reactions of two women over fifty who were demoted to lower paying, lower status jobs at the Johnson Controls plant in Bennington, Vermont. In the words of a Boston Globe reporter who interviewed them, "[t]he company's contention that the mandatory transfer to low lead exposure jobs was for the protection of her future children sends a rush of red from [Virginia] Green's neck to her gray hairline, prompting her to ask rhetorically whether women are not bright enough to make sensible choices about their own reproductive lives. It prompts [Elsie] Nason, now 57 ... [to say] 'Ridiculous, and degrading. I've been divorced for 16 years. I felt they'd pointed a finger at me as if I was some shady lady going out and

getting pregnant. At my age! They took me off my job for foolishness and I'll be mad about it, and the smutty jokes I had to hear from the men about an old lady like me still having her period, until the day I die.'" Eileen McNamara, "Factory and Fertility," *Boston Globe* Oct. 17, 1989.

The majority below, however, was concerned that, given the importance of jobs and adequate income to "better [her] family's station in life, it would not be improbable that a female employee might somehow rationally discount" the risk to her fetus if she became pregnant. 886 F.2d at 897. This reasoning overlooks the fact that employers are just as likely to rationally discount the risk to women and their families from unemployment or reduced wages, since, once the woman is out of the workforce, any of her problems are simply no longer of any concern to the employer. As explained by Professor Mary Becker, "an employer faced with evidence that a group is hypersusceptible ... is likely to make the decision to exclude that group based, not on the costs and benefits to the workers and their families, but on the employer's need for members of that group in its labor force. If the group is very marginal – as women are in traditionally male jobs – the employer has every incentive to exclude the group's members even though the heightened risks may be very low ... and the benefits of allowing the group to work (benefits in this case to both women and to their children) are very high." Becker, *supra*, 53 *U. Chi. L. Rev.* at 1239-40. Title VII and the PDA were enacted to take away from employers the right to make such economic cost-benefit calculations about a group of workers perceived as marginal because of a characteristic – childbearing capacity – unrelated to their ability to do the job.

Another major analytic flaw of Johnson Controls' focus only on women as the locus of concern about the health of future generations is that the present policy totally ignores the male capacity to impregnate. Men contribute to the health of future

generations as well as women, and lead is highly toxic to men's fertility and sperm motility. The definition of the policy at issue in this case as a *fetal* protection policy means that the concern about reproductive health remains a narrow one, considering only one aspect of reproduction, only one way in which adverse reproductive outcomes can occur. And it means that the scrutiny will always remain on women, and on their role in reproduction, to the detriment of men's reproductive health.

While fears about developmentally impaired children can loom large in a company's mind, company decisionmakers are less likely to think about the children who are desperately wanted but never get conceived. They are less likely to think about the miscarriages suffered by a wife of a male worker because his sperm was damaged by lead exposure. But to the families who must live with the consequences of lead, the infertility or the pregnancy loss may be more of a tragedy, more of an endangerment to physical and mental health, than a wanted child who turns out to be less intelligent or capable than some of her peers.

C. Johnson Controls' Professions of "Moral Concern" Are Severely Undermined by the Amount of Risk to Worker and Consumer Health That The Company Routinely Tolerates as an Aspect of Lead Battery Manufacturing.

The channelling of all of the company's concern about reproductive health onto potential fetuses to the detriment of existing men and women leads to the untenable conclusion that only for fetuses – something that only women carry – shall there be absolutely no risk. The company's total intolerance for fetal risk starts to look suspiciously like a justification for discrimination when all of the other risks that it rationally, economically tolerates are taken into consideration. Johnson Controls countenances the high risk of cardiovascular damage from blood lead levels as low as 10ug/dl to its existing male

workers. It tolerates the risks to the environment and to the health of future generations from the disposal of lead batteries and other hazardous waste from the production process. It accepts some risk of harm to consumers from defective or exploding batteries. It tolerates risks to the children of workers from the workers bringing lead residues home on their clothing. It tolerates all sorts of risks to workers from innumerable conditions in and around its plants, ranging from slippery floors to repetitive motion injuries to cigarette smoke. When seen from the perspective of all of the risk that the company is willing to accept, the "moral imperative" for excluding women because some of them *might* some day choose to become pregnant starts to look more and more like a disingenuous rationalization for keeping women out of the workplace.

Against this background, which highlights the tenuous connection between a refusal to hire all fertile women of a broad age spectrum and protection of the health of future generations, arguments that "moral concern," "social cost," "ethical considerations," or economic fears about future liability costs should justify a radical departure from established law governing facial discrimination under Title VII and the PDA should be greeted with skepticism. These arguments are no more tenable a reason for barring women from employment opportunities today than they were in the early 1970's when Title VII was used to discredit the outdated 1908 ideology of *Muller v. Oregon*.

II. EXPANDING THE BFOQ DEFENSE TO INCLUDE CONSIDERATIONS OF MORAL CONCERNS AND SOCIAL COSTS, INCLUDING POTENTIAL TORT LIABILITY, WILL EVISCERATE TITLE VII AND UNDERMINE THE SAFETY-ENHANCING GOALS OF TORT LAW.

Both the majority and Judge Posner, dissenting below, suggested that the BFOQ defense ought to be broad enough to

encompass, as Judge Posner put it, an employer's concerns with the "normal operations" of a business, including "ethical, legal, and business concerns about the effects of its activities on third parties," and such "social costs" as potential tort suits by future children of employees. Such a wholesale expansion of the BFOQ defense was squarely rejected by Congress, when the Senate rejected a proposed amendment to Title VII that would have allowed discrimination whenever it would be "more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of his race, color, religion, sex, or national origin." 110 Cong. Rec. at 13825 (June 15, 1964). This Court should not let concern about potential harm to potential fetuses tempt it to open up what is supposed to be the most narrow defense to facial discrimination.

A. The Social Costs of Toxic Workplaces Are So Open-ended That Consideration of Them Would Overwhelm Title VII Trials With Social Policy Judgments Better Left to Congress.

At the end of this "social cost" path lies a tangle of judicially unmanageable speculations, that, if indulged, would swallow up Title VII's ban on discrimination on the basis of pregnancy and capacity to become pregnant. What social costs should employers and courts have to consider? And social costs to whom? And how large, or how certain, must the social cost be before it becomes a legitimate factor for consideration? If employers may consider potential risks to fetal health, should they not also have to consider potential risks to paternal health and maternal health? What about the costs to women and their children of unemployment or reduced wages and benefits? What about the cost to a woman's esteem and dignity from being told that she cannot have a certain job simply because she has a womb? What about the social cost of continuing to label women as marginal workers, creatures more valued for their reproductive than their productive capacity? What about the social cost of the perpetuation of some men's stereotyped attitudes about women's productive capabilities and social role? What about the social cost of perpetuating occupational segregation, and with it, the wage gap between men and women?

Many of these important social costs flowing from excluding women from certain jobs can be just as scientifically documented as the risks to fetuses from lead exposure. Yet to have to weigh all of these factors in assessing a BFOQ defense would surely turn Title VII trials into legislative policy sessions, evaluating the question of which social cost is of greater priority — the immediate harms to current workers from discrimination, or the possible future harm to nonexistent fetuses? Congress has already answered this question, and has made the judgment that a woman's ability to do the job is the only relevant factor for evaluating whether she may be excluded because of her capacity to become pregnant. 42 U.S.C. 2000e(k).

As the above questions illustrate, "social cost" analysis is entirely open-ended. Thus, allowing "moral concerns" about the social cost of the risk of maternal employment to fetal health to enter into either the BFOQ or business necessity analysis will swallow up Title VII's prohibition of sex discrimination. There is no logical line at which to end acceptance of professed concerns for fetal health. Just as lead and other toxins may pose a risk to fetuses, so may stress, fatigue, standing or sitting for long hours, and exposure to the colds, viruses, and cigarette smoke of other workers. So, should concern for fetal health permit employers to refuse to hire women for jobs deemed to be stressful, jobs that require standing long hours at assembly lines or service counters or in restaurants? Should employers be able to use concern for fetal health to justify forced leave for all women after a certain month of pregnancy, because the stress and fatigue risks of the job increase at that time? (This practice was declared unconstitutional when practiced by a public agen-

cy in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).) Should taxi and bus companies be able to refuse to hire women as drivers because, if they got pregnant and if they were in an accident, it would be not only them but their fetuses that might be injured? (It should be noted that the statistical risk of getting in an accident given the number of hours spent on the road by a professional driver is at least as high, if not higher, than the risk of lead exposure to a fetus.) Should employers be able to rely on child development studies that claim that very young children develop better intellectually and emotionally when given the constant attention of a primary parental caretaker in the home to refuse to hire women with young children, because those children will be better off with the mother at home than with the mother employed? (This sort of policy was declared to violate Title VII in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).) It does not take much of a march along this "parade of horribles" to understand how great an incursion on women's employment opportunities the "social cost of possible fetal harm" defense would permit.

While an employee's ability to perform the job safely has been a legitimate BFOQ and business necessity consideration, this factor properly includes only safety risks to co-workers and existing third parties such as customers. It cannot include safety risks even to actual fetuses. *See, e.g., Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980), and *In Re National Airlines*, 434 F. Supp. 249 (S.D. Fla. 1977), in which courts upheld the exclusion of pregnant flight attendants from flying during the advanced stages of pregnancy because of evidence that late term pregnancy interfered with the ability safely to serve passengers, but rejected the argument that fetal safety also supported the exclusion, because judgment about what risks to accept for one's future child were best left to the mother and were of no legitimate concern to the airline. As mentioned in Part I of this brief, this conclusion is the only one consistent with respect for the autonomy and individuality of women.

After all, it is not the employer, but the woman and her family, who has to bear both the consequences of job loss or demotion and the consequences of any ensuing harm to a child. Those whose lives will be most directly affected by an event are the ones who should make the decision whether to bear the risk. Finley, *supra*, at 16-27-28.

B. Concern About Potential Tort Liability Is an Improper Component of a Title VII Defense.

Employers may assert that their businesses will be affected, however, if harm occurs to a child of a female employee, because that child may sue the employer in tort.[3] Concern about tort liability is essentially a cost concern, and cost has been emphatically rejected as a defense to facial sex discrimination by this Court in *City of Los Angeles Dep't of Water & Power v. Manhart*, *supra*. Even those courts that have allowed some expansion of Title VII defenses because of concern about fetal health have drawn the line at concern about future tort liability. As the 11th Circuit explained in *Hayes v. Shelby County Memorial Hospital*, *supra*, 726 F.2d at 1553 n.15:

> In today's litigious society, the potential for litigation rests in almost every human activity. For example, every employer faces the risk that a pregnant employee will encounter a workplace activity that would not normally be hazardous to a nonpregnant employee, but which could prove injurious to a developing fetus. These hazards range from slippery floors to uncontrolled cigarette smoke, asbestos,

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[3] While Johnson Controls has not asserted fear of tort liability as a justification for its policy, perhaps because liability is so speculative or because this justification is so clearly precluded by existing law, Judge Posner suggests that such fear should enter into BFOQ analysis. As an organization expert in tort law and dedicated to seeing the safety-enhancing goals of tort law respected, TLPJ is in a unique position to provide guidance on this matter.

> known and unknown carcinogenic materials used in the workplace and a plethora of other hazards of modern society. The employer is, of course, free to protect itself from financially ruinous lawsuits by purchasing insurance and by maintaining the degree of care required by law.

Because tort liability is a danger pervading everything manufacturers such as Johnson Controls do, it can hardly stand as an excuse for facial sex discrimination.

Johnson Controls faces a risk of tort liability for activities ranging from the manufacture of batteries to the disposal of batteries. The risk of future suits from subsequently born children of female employees is actually one of the slightest tort risks that it faces. The contemplation of these suits requires several more speculative steps beyond the speculation about the likelihood that a woman will get pregnant and bear a damaged child. If that happens, it is speculative whether the child will sue and, if so, whether the child will be able to mount sufficient proof of injury caused by maternal lead exposure, given all the other possible sources of lead exposure and possible causative factors for impaired development. Johnson Controls faces at least as great a risk of tort suits by children of male workers alleging that they were harmed by paternal lead exposure. Indeed, there have been several notable claims brought alleging birth defects due to paternal exposure to a toxin. See, e.g. *In Re Agent Orange Products Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985)(claims of children born to Vietnam Veterans alleging birth defects caused by paternal exposure to Agent Orange dismissed for failure to prove causation); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983) (suit alleging that paternal exposure to ionizing radiation during atomic testing caused plaintiff's birth defects); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983)(same); 9 Occup. Safety & Health Rptr. (BNA) 339 (Current Report, Sept. 13, 1979) (describing claim

brought by male worker that his occupational exposure to DBCP caused deformities to his child); Judith Scott, "Keeping Women in Their Place", in W. Chavkin, Ed., *Double Exposure* 184-191 (1984) (describing claims of male railroad workers against Long Island Railroad that their children were born with hip deformities caused by paternal exposure to defoliants, and significant number of incidents of children of male pesticide workers fathering children with serious heart defects). In light of the reality that tort liability can come just as much from the children of male workers as those of female workers, it can hardly stand as a defense to a refusal to hire women.

If fear of potential tort liability were to excuse sex discrimination, such a result would undermine the goals of both Title VII and tort law. It would give the dirtiest, least technologically efficient, least safety conscious employers a built-in excuse for discriminating, because the more likely the prospect of actual tort liability, the stronger the defense to employment discrimination. Thus, incentives to provide as clean a workplace as reasonably feasible, to search for improved technology to even further reduce lead exposure, and to push ahead with the search for a lead-free battery would be greatly reduced. After all, so long as women are marginal workers in the formerly male-dominated lead battery manufacturing process, it will always appear easier, and less costly for employers to exclude women than to invest in technological improvements that might better the health of everyone. For this basic reason, the theory of law and economics must remain merely a fashionable academic theory to explain employer actions, rather than be turned into a loophole in Title VII law excusing employer actions that keep women in the home or in "women's work."

One fundamental tenet of tort law is that fear of liability is supposed to provide a deterrent to unsafe actions, and an incentive to constantly improve safety. This goal would be devastated if speculative tort liability could excuse a refusal to

hire women. The goal can only be accomplished if employers cannot avoid the specter of tort liability by avoiding women. Rather, employers must be encouraged, through the congruence of Title VII and tort law, to face up to their potential liability by making the workplace as safe as possible for women and men, and for the offspring of both sexes.

The responsible employer concerned about the health of future generation and tort costs has several viable options far short of excluding women. The responsible employer can meet all obligations imposed by the tort standard of care, can fully warn and inform workers of both sexes of the reproductive risks, and can continue to invest in reasonable technology and equipment to further reduce occupational lead exposure. The responsible employer can also allow workers of both sexes who wish to procreate to transfer temporarily, at no loss of pay or benefits, to positions that would enable them to lower their blood lead levels. The intersection of tort law with Title VII requirements, far from putting an employer between the proverbial rock and a hard place, encourages employers to work vigilantly to improve workplace safety.

II. THE ANIMAL STUDY DATA PRESENTED BY PLAINTIFFS PRECLUDES THE ENTRY OF SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

In order to enter summary judgment in Johnson Controls' favor, the majority below did not simply misinterpret Title VII. It also rejected plaintiffs' substantial evidence of reproductive harm to male workers by making an assertion that would astound any reputable practitioner of occupational or environmental medicine. The majority asserted that "animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a nonspeculative conclusion that a father's exposure to lead presents the same

danger to the unborn child as that resulting from a female employee's exposure to lead." 886 F.2d at 889-90.

This assertion is odd in light of the fact that the conclusion about risk to potential fetuses of nonpregnant women was itself so speculative. It is also curious in light of the fact that the level of risk Johnson Controls deemed acceptable for women was zero. But this assertion is also legally and scientifically untenable, because it rejects out-of-hand a type of data routinely and properly relied on by regulatory agencies in making risk assessments and experts when assessing causation.

In deciding that the level of lead exposure approved by OSHA was insufficient to protect a fetus if any of its women employees were to become pregnant, Johnson Controls was engaged in the same sort of risk assessment activity that regulatory agencies themselves are authorized by Congress to undertake. When OSHA set the lead standard and concluded that there was no basis for excluding fertile women because men also faced risks to their reproductive health at equal levels of exposure, it relied in part on animal studies for assessing both male and female mediated risks. Yet Johnson Controls presumed to substitute its judgment for the relevant federal regulatory agency that had engaged in painstaking factfinding by refusing *even to consider* an entire type of data relied on by OSHA. Moreover, the majority below compounded this error by presuming that judges without scientific training did not even have to consider the same types of evidence routinely relied on by scientists, medical experts, and regulatory agencies.

The enterprise of risk assessment remains fundamentally the same regardless of whether it is undertaken by an occupational or environmental medicine specialist, a regulatory agency, a jury, or an employer. Each risk assessor should have to consider the same types of evidence, particularly a type of evidence regarded as essential to the enterprise by medical science. Indeed, this Court has approved the use by regulatory

agencies of animal studies, *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980), as has the U.S. Court of Appeals for the District of Columbia Circuit on numerous occasions, *see, e.g., Environmental Defense Fund v. EPA*, 548 F.2d 998 (D.C. Cir. 1976); *EDF v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986). Dr. David Rall, the Director of the National Institute of Environmental Health Sciences of the National Institutes of Health, has observed that animal studies provide evidence to link a chemical to a disease that "is critical for the regulatory agencies that must make decisions to control chemicals, but it [animal study evidence] is also important to the physician and health care worker who needs to diagnose a disease that may be caused by a chemical." Rall, "Relevance of Results from Laboratory Animal Toxicological Studies", in J. Last, ed. *Public Health and Preventive Medicine* 515 (12th ed). Results of animal studies showing toxicity, carcinogenicity, and adverse reproductive outcomes have also been deemed highly relevant bases for concluding, in tort suits, that a manufacturer reasonably should have known of the risks to humans and thus should have warned humans. *See, e.g., Needham v. White Laboratories*, 639 F.2d 394 (7th Cir. 1981); *Bichler v. Eli Lilly & Co.*, 55 N.Y.S. 2d 571 (App. Div. 1982) (DES cases in which evidence from animal studies that DES could cross the placenta and cause cancer and abnormalities in female offspring lead to conclusion that manufacturers of the drug had a duty to warn about these risks).

If animal studies are to be precluded out-of-hand, as was done by the majority below, then the only public health alternative is for epidemiologists and experts in occupational and environmental medicine to wait until enough people have been injured or killed from toxic exposures that a large enough sample exists for making a statistically significant epidemiological calculation. This approach has been unanimously rejected by the medical and public health community. L. Gordis, *Epidemiology*

and Health Risk Assessment 37 (1988); J. Harrington & F. Gill, *Occupational Health* 99 (1987). It should similarly be rejected by the courts. *See, e.g., Ferebee v. Chevron Chemical Co.*, 552 F. Supp. 1293, 1301 (D.D.C. 1982), *aff'd*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984) ("A civilized legal system does not require that much human sacrifice before it can intervene.")

Animal studies drawn from exposed animal populations and epidemiological studies drawn from exposed human populations are complementary, interdependent methods. An epidemiologist will make an observation of an unexpected health phenomenon in some humans, which will trigger animal tests of the suspected agents. If these tests demonstrate toxicity, then the epidemiologist will use this finding to devise a human population study. Further animal studies may then be used to strengthen a causal inference revealed by the human study. Gordis, *Epidemiology*. "Without laboratory studies of animals, [scientists] could not estimate the substance's risks under conditions to which the human population may have been exposed, but for which epidemiologists have not and perhaps cannot control and for which epidemiological methods may lack required sensitivity." P. Schuck, *Agent Orange On Trial* 236 (1986).

While animal studies are not a perfect predictor of effects in humans, because of species and dose differences, they are nonetheless relied upon in the field of environmental and occupational medicine, and by regulatory agencies, for the following reasons:

> One of the questions commonly raised about carcinogenicity studies is why are animal studies relevant to humans. Some answers to this question include:
>
> (1) Most known human carcinogens are also animal carcinogens and many were first found to be carcinogenic in animals;

(2) Animals have long been used in a variety of toxicity tests and in most cases have been found to be excellent predictors of human toxicity;

(3) Animals and humans have many of the same metabolic pathways and responses to injury; and

(4) It is undesirable, to say the least, to use humans as experimental animals when other means exist to determine potential risk to humans.

D. G. Goodman, "Animal Testing of Carcinogens," 2 *Occupational Medicine: State of the Art Reviews* 43-49 (Jan.- March 1987); *see also* Rall, *supra* at 516, 519. These observations are no less valid for reproductive hazards that can have teratogenic effects on fetuses or mutagenic effects on sperm and eggs. *See* Office of Technology Assessment Task Force, *Reproductive Health Hazards in the Workplace* (1988).

The conclusion of the majority below that epidemiological evidence derived from human populations is inherently much more probative for determining risk to human beings than animal studies overestimates the usefulness of epidemiological studies just as it underestimates the importance of animal studies. While animal studies present the problem of extrapolating from one species to another, epidemiological studies present the problem of jumping from aggregate information about large numbers of humans previously exposed to predictions about risk to a particular individual with a different health level exposed to different amounts under different conditions. The point is not to disparage the usefulness of epidemiology — it is extremely useful in making risk assessments and drawing causal inferences — but to underscore that epidemiology is no more or less relevant than animal studies for determining causation or assessing risk. Any risk assessment that excludes data from animal studies —such as the risk assessment of male mediated reproductive harm engaged in by Johnson Controls and the majority below — is not a scientifically sound risk assessment.

In deciding that the risk to women of adverse reproductive outcomes was so much greater than the risk to men of adverse reproductive outcomes from lead exposure that women should be barred from jobs, Johnson Controls was functioning essentially as a regulatory agency. It ought to have to rely on the same kind of evidence that a regulatory agency would have to rely on in making the assessment of whether there is *some risk* to men from the current lead level in certain production jobs. The standard of "some risk" to men is the appropriate one because, by acting to exclude all fertile women regardless of childbearing plans or likelihood, Johnson Controls has effectively set the risk threshold for women at zero. *See* dissenting opinion of Judge Easterbrook, below. Moreover, if Johnson Controls' professed concern for the health of future generations is to be taken seriously, then the company should have to consider a wider variety of reproductive risks than those that operate on fetuses through women. It should have to consider the risk of malformed sperm that might produce fetal harm or even miscarriage, or reduced sperm count leading to sterility in men. As pointed out in Part I, the company's focus on a primarily female mediated risk — the kinds of reproductive harm presented once a fetus has already been created — is inherently discriminatory. This narrow focus fails to adequately protect reproductive health of men and women.

The company's narrow definition of the types of reproductive risks it will consider, coupled with its failure to consider animal study evidence about male mediated harm, amounts to a callous indifference to the reproductive health of men. Failure to consider animal studies is tantamount to saying to men, "Many of you will have to become sterile, many of you will have to suffer through your wives' miscarriages, many of you will have to shoulder the burden of damaged children, until such time as medical science produces more studies of men, and conclusive studies of men."

The law does not and should not require such sacrifice. The animal study evidence presented by plaintiffs, without more, requires reversal of the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be overturned.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR MASSACHUSETTS, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, NEBRASKA, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, PUERTO RICO, TEXAS, VERMONT, THE VIRGIN ISLANDS, AND WASHINGTON AS AMICI CURIAE URGING REVERSAL

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The Attorneys General of Massachusetts, Arizona, Connecticut, Delaware, Florida, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Puerto Rico, Texas, Vermont, the Virgin Islands, and Washington submit this brief amici curiae in support of the petitioners International Union et al., urging this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

INTERESTS OF AMICI CURIAE

The amici states joining in this brief have a number of compelling interests that are threatened by the broadly exclusionary "fetal protection" policy at issue in this case. First, the states have a strong interest in equal employment opportunity and in the right of their female, as well as male, citizens to participate in the

workforce free from gender-based discrimination. The states' interest in freedom from employment discrimination based on sex is reflected in state antidiscrimination laws,[1/] which are frequently enforced to provide more protection for employees than do the cognate provisions of federal law.[2/]

The states have a particular interest in remedying the economic problems related to gender discrimination: the continuing wage

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1/ E.g., Mass. Gen. L. ch. 151B (1988); Mass. Gen. L. ch. 149, §105D (1988); Mass. Const. pt. I, art. I; Mich. Comp. Laws Ann §37.201 (West 1985 & Supp. 1990); Minn. Stat. ch. 363 (1988); N.Y.S. Exec. Law §296 (McKinney 1982 & Supp. 1990).

2/ See, e.g., Cal. Fed. Sav. & Loan v. Guerra, 479 U.S. 272 (1987); Mass. Electric Co. v. Mass. Comm'n Against

(footnote continued)

gap between male and female workers, and the poverty of many female-headed households. The exclusion of women from decent-paying jobs makes families (especially those that are female-headed) poorer, which in turn has a host of adverse health as well as financial consequences.

The majority of women are in the national workforce, and their numbers are increasing,[3/] yet despite

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(footnote continued)

Discrimination, 375 Mass. 160, 375 N.E.2d 1192 (1978); Lynn Teachers Union, Local 1037 v. Mass. Comm'n Against Discrimination, 406 Mass. 515, 549 N.E.2d 94 (1990); People v. N.Y.C. Transit Authority, 59 N.Y.2d 343 (1983); Farmington Educ. Assoc. v. Farmington School Dist, 133 Mich. App. 566, 351 N.W.2d 242 (1984); Michigan Dep't of Civil Rights v. Michigan Dep't of Civil Service, 101 Mich. App. 295, 301 N.W.2d 12 (1980), app. denied 411 Mich. 1034 (1981).

3/ As of 1988, 56.6 percent of all

(footnote continued)

antidiscrimination laws, women continue to suffer from a substantial wage gap. Wages of women are far lower than those of men in virtually every employment category.[4/] Because of this wage differential, female-headed households face particular difficulties. One third of the individuals living in female-headed families are poor, and female-headed families are four times as likely as other families to be

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(footnote continued)

women age 16 or older were in the labor force. The American Woman 1990-1991 app. at 376, table 14 (S. Rix ed., for the Women's Research and Education Institute 1990) [hereinafter WREI report]. The labor force participation of women between the ages of 20 and 44 (the primary reproductive years) ranged from 73 to 75% in 1988. Id., app. at 377, fig. 5.

4/ Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the

(footnote continued)

living in poverty. [5/]

One of the causes of this overall wage differential is that women have traditionally been excluded from higher-paying blue-collar jobs. This is changing only slightly, and women are still paid less than men even while working in traditionally male jobs.[6/]

Of significant concern to the

(footnote continued)

United States (109th ed. 1989) at 406, Table 666 [hereinafter Statistical Abstract]. The median annual income of women working full time in 1986 was only 65% of the median annual income of men working full time. WREI report, supra note 3, app. at 390, fig. 10. In 1987, women constituted 65% of all hourly workers making at or below minimum wage. Statistical Abstract, supra at 411, table 675.

5/ WREI report, supra note 3, app. at 363, 396, table 31.

6/ For example, in 1988, only 1.4% of employed women worked in the construction industry, in contrast to

(footnote continued)

states is that exclusion of women from certain jobs, particularly those providing relatively high wages and good benefits, will have negative long-term effects on public health and particularly on the health of children.[7] Many women forced into unemployment or lower-strata jobs can be expected to lose employer-provided health insurance. Underemployment also plays a significant role in determining

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(footnote continued)

10.9% of employed men. WREI report, supra note 3, app. at 385, fig. 9. Data for women's wages in construction are not available because of the small sample size, but for the "precision production" category, which includes construction trades, in 1987 the median weekly earnings of men were $431, while women's median weekly earnings were $302. Statistical Abstract, supra note 4 at 406, table 666.

7/ The National Center for Children in Poverty recently reported that "in

(footnote continued)

a person's likelihood of being insured.[8]

With a loss of health insurance, the well-documented negative health effects of unemployment, low wages and poverty can only be exacerbated. Unemployment is related to a number of adverse health outcomes, including increased rates of death, suicide, and

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(footnote continued)

1985, 1.5 million poor children under six - 30 percent - were not eligible for Medicaid and were not covered by any other type of health insurance. In addition, nearly 1 million near-poor children under six - 32 percent - lacked health insurance coverage from any source." National Center for Children in Poverty, School of Public Health, Columbia University, Five Million Children, A Statistical Profile of Our Poorest Young Citizens 64 (1990)[hereinafter Five Million Children]. See generally, Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1230-1232 (1986).

8/ In 1986, 24.4% of full-time employees working throughout the year

admissions to mental hospitals.[9/] Indeed, most infant morbidity and mortality in the United States is linked to premature birth and low birthweight. These factors in turn are strongly associated with poverty and inadequate prenatal care.[10/]

(footnote continued)

lacked health insurance, while 75% of part-time employees working throughout the year lacked health insurance. 88.7% of part-time workers who worked only part of the year had no health insurance. Congressional Research Service, Library of Congress, Health Insurance and the Uninsured: Background Data and Analysis 97 (1988).

9/ House and Senate Joint Econ. Comm., Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong., 2d. Sess. 2-5 (1984).

10/ Binsacca, Ellis, Martin & Petitti, Factors Associated With Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also, Rush, Socioeconomic Status and

(footnote continued)

Thus, a policy like Johnson Controls', which deprives virtually all women of access to a broad range of relatively high-paying, secure, unionized jobs, not only undermines the states' concerns for equal employment opportunity but exacerbates the continuing effects of gender disparities in the workforce: lower

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(footnote continued)

Perinatal Outcome, in Prenatal Intensive Care 14-17 (S. Adajem & A. Brown eds. 1977) (discussing striking relationship between changes in the unemployment rate and changes in infant mortality rate); Meyerowitz & Lipkin, Psychosocial Aspects, in Prevention of Embryonic, Fetal, and Perinatal Disease 263, 267 (R. L. Brent & M. I. Harris eds. 1976) (discussing correlation between adverse economic, social and family circumstances for the pregnant woman and pregnancy complications, prematurity, low birth weight and subsequent developmental problems for their infants); Chez, Haire, Quilligan & Wingate, High-Risk Pregnancies: Obstetrical and Prenatal Factors, in

(footnote continued)

wages, poverty, underinsurance, and poor health.

The amici states also have an interest in removing health hazards from the workplace. This interest is recognized in the Occupational Safety and Health Act, which "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws ..." 29 U.S.C. §651(b)(11). The Act reserves power to the states over "any occupational safety or health issue with respect to which no federal standard is in effect..." 29 U.S.C. §667(a). Under

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(footnote continued)

Prevention of Embryonic, Fetal, and Perinatal Disease, supra at 70-72 (discussing correlations between socioeconomic status and successful pregnancies, and between health care and successful pregnancies).

this section states are free to adopt standards more stringent than those promulgated by the Occupational Safety and Health Administration ("OSHA") if their effect is to protect the health and safety of the public.[11/] The Act also permits states to submit plans to develop and enforce occupational safety and health standards where OSHA standards are already in effect, provided that such plans are "at least as effective" as OSHA standards. 29

11/ Assoc. Indus. of Mass. v. Snow, 898 F.2d 272 (1st Cir. 1990). See also, Envtl. Encapsulating Corp. v. New York City, 855 F.2d 48 (2d Cir. 1988)(state asbestos regulations are not expressly preempted by OSHA because they have a legitimate and substantial purpose of promoting public safety and health).

U.S.C. §667(b),(c)(2).[12/]

Given the states' strong interest in and responsibility for workplace health and safety, they are gravely concerned about the widespread nature of occupational health hazards, the costs of resulting occupational disease, and the ways in which a "fetal protection" policy like Johnson Controls' ignores dangers to the male reproductive system and in fact may act as a disincentive to cleaning up workplaces.

Health problems caused by workers' exposure to harmful substances are widespread. OSHA estimates that more

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12/ There are 23 OSHA-approved state plans to develop and enforce occupational safety and health standards. 29 C.F.R. § 1952 (1989). These states have effectively assumed all responsibility for ensuring safe and healthy work environments for their citizens.

than 21 million employees are potentially exposed to hazardous substances in the workplace and that more than 4 1/2 million of them are exposed above the limits set by OSHA.[13/] The result of these exposures is widespread occupational disease, from which an estimated 100,000 people die annually nationwide.[14/] The national rate of occupational illness reported by the U.S. Department of Labor in 1985 was 10 per every 10,000 workers; the national

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13/ Preamble to OSHA Final Rule Revising Workplace Air Contaminant Limits, 54 Fed. Reg. 2781, 2725 (January 19, 1989) [hereinafter OSHA Final Rule].

14/ Office of Technology Assessment, U.S. Congress, Preventing Illness and Injury in the Workplace, OTA-H-256 37(1985). An estimated 10 percent of all deaths from cancer, for example, have an occupational origin. OSHA Final Rule, supra note 13, at 2781.

rate just one year later was 19 per every 10,000 workers.[15/]

Reproductive health hazards, the particular focus of Johnson Controls' policy, are particularly widespread. According to federal estimates, more than 14 million workers are potentially exposed each year to known or suspected reproductive hazards on the job. Reproductive disorders are among the ten leading work-related disorders in

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15/ Bureau of Labor Statistics, U.S. Dep't. of Labor, Occupational Injuries and Illnesses in the United States by Industry 1986, Bulletin 2308 p. 5 (1988). In Massachusetts alone, an estimated 4,000 new cases of work-related illness were diagnosed and reported in 1987. Massachusetts Interagency Task Force on Occupational Injury and Illness Surveillance and Intervention, Occupational Safety and Health in Massachusetts - The Need For Surveillance 4 (1989).

the United States.[16/] At least 50 substances in common industrial use are known or suspected reproductive hazards based on human or animal data, [17/] yet only three are federally regulated by OSHA based partially on reproductive

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16/ Centers for Disease Control, Leading Work-Related Diseases and Injuries - United States, 34 Morbidity and Mortality Weekly Report 537, 538 (1985) [hereinafter CDC]

17/ CDC, supra note 16, at 537. Reproductive workplace hazards include a wide range of substances, including lead, ethylene oxide, dibromochloropropane (DBCP), organic and inorganic mercury, ionizing, radiation, anesthetic gases, alkylating agents, glycol ethers, carbon disulfide, and infectious agents which can cause intrauterine infections. Daniels, Paul & Rosofsky, Family, Work and Health, 21-22 (1988) (issued by Mass. Dep't of Public Health); Occupational Health 310-312 (B. Levy & D. Wegman eds. 1983); Office of Technology Assessment, U.S. Congress, Reproductive Health Hazards in the Workplace, OTA-BA-266 (1986) [hereinafter Reproductive Health Hazards] at 85-86. Glycol ethers have

(footnote continued)

effects.[18]

As the above data suggest, reproductive workplace hazards affect both men and women. Indeed, OSHA, which regulates lead,

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(footnote continued)

been shown to be teratogenic in animal studies and toxic to sperm in human and animal studies. Daniels et al., supra at 20. An estimated 200,000 workers are potentially exposed to glycol ethers. CDC, supra note 16, at 538. Studies have shown that paternal exposure to anesthetic gases is strongly associated with an increased rate of congenital abnormalities, while maternal exposure is strongly associated with an increased spontaneous abortion rate. Occupational Health, supra at 310. Alkylating agents used in cancer chemotherapy have been shown to produce permanent sterility. Id. at 312. Ethylene oxide, used in medicine and industry, causes testicular damage and impaired fertility, according to animal studies. Reproductive Health Hazards, supra, at 85-86.

18/ These are lead, ethylene oxide, and dibromochloropropane (DBCP). 29

(Footnote continued)

dibromochloropropane (DBCP) and ethylene oxide partially on the basis of their reproductive effects, regulates these substances in a gender-neutral way.[19] Although research conducted thus far has largely ignored the effects of many substances on men's reproductive systems and on reproductive effects traceable to the operation of men's reproductive systems (e.g., the operation of defective

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(footnote continued)

C.F.R. §1910.1025 (1989)(lead regulations); 29 C.F.R. §1910.1047 (1989)(ethylene oxide regulations); and 29 C.F.R. §1910.1044 (1989)(DBCP regulations).

19/ See, 29 C.F.R. §1910.1044 (1989), 29 C.F.R. §1010.1047 (1989), 29 C.F.R. §1910.1025 (1989).

sperm),[20/] the states are concerned that "fetal protection" policies which focus only on removing women from contact with a particular hazard ignore the health risks to men and their offspring and reduce employer incentive to find alternatives to dangerous chemicals. The states have a strong interest in protecting all of their citizens by removing reproductive and other hazards from the workplace.[21/]

SUMMARY OF ARGUMENT

Johnson Controls' "fetal

20/ Occupational Health, supra note 17 at 307, Becker, supra note 7 at 1236-7; Reproductive Health Hazards, supra note 17 at 16-17; Needleman & Bellinger, Commentary, 46 Env. Research 190-191 (1988).

21/ States also lose revenue as a result of occupational disease.

(footnote continued)

protection" policy constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Because Johnson Controls' policy is facially discriminatory, the only defense it can assert is that sex is a bona fide occupational qualification ("BFOQ"). A "fetal protection" policy, however, cannot be justified as a BFOQ because fertile women can unquestionably

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(footnote continued)

According to a national survey, $11.4 billion in income was lost in 1978 because of disabling occupational illness. Massive wage loss of course reduces tax revenues. Conversely, welfare costs, funded in part by the states, rise on account of workplace hazards. Welfare currently provides 16% of the funds replacing income lost by individuals disabled from occupational disease. U.S. Dep't of Labor, An Interim Report to Congress on Occupational Diseases 2 (1980).

perform the jobs at issue and because the protection of possible fetuses is not the essence of a battery manufacturer's business within the meaning of Title VII.

Moreover, Johnson Controls' policy is not justified on the grounds of public health. First, the exclusion of virtually all women from a wide category of jobs contributes to a gender-stratified workforce and undermines the economic and social well-being of women and their families. Second, such policies ignore workplace reproductive hazards to men and operate as a disincentive to cleaning up the workplace. The Court should therefore reverse the judgment of the court below and either remand for further proceedings or direct the

entry of a judgment for the petitioners.

ARGUMENT

I. JOHNSON CONTROLS' "FETAL PROTECTION" POLICY CANNOT BE JUSTIFIED AS A BFOQ UNDER TITLE VII.

Johnson Controls' "fetal protection" policy on its face constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964,[22/] as it explicitly excludes all fertile women from a broad range of jobs. Intern. Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 876-7 (7th Cir. 1989).

22/ 42 U.S.C. §2000e, et seq., as amended in 1978 to provide that unlawful sex discrimination includes discrimination on the basis of "pregnancy, childbirth, and related medical conditions." Pregnancy Discrimination Act, Pub.L. No. 95-555, §1, 92 Stat. 2076, (codified at 42 U.S.C. § 2000e(k)).

Because Johnson Controls' policy is facially discriminatory, the only defense it can assert is that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1).[23/] The BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). The BFOQ is a narrow defense precisely because the purpose of Title VII is to outlaw the assumptions and stereotypes that kept women from equal employment opportunity. Id. at 333-4, nn. 18, 19; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).[24/] The burden of proof for a BFOQ is on the employer: "[A]n employer [can]

23/ The states thus agree with the Equal Employment Opportunity Commission (EEOC) that a defendant "in a case challenging a facially discriminatory fetal protection policy [should be allowed] only the statutory defense that sex is bona fide occupational qualification." EEOC Policy Guidance on Seventh Circuit Decision in United Auto Workers v. Johnson Controls, Inc., 2 EEOC Compl. Man. (CCH) ¶4319 (Jan. 26, 1990) [hereinafter EEOC Policy Guidance]. See, Ariz. Governing Com. v. Norris, 463 U.S. 1073, 1084 n. 13 (1983). But even if this Court were

(footnote continued)

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to permit application of the business necessity defense to explicit sex discrimination, Johnson Controls' policy cannot be justified, as the states demonstrate below.

24/ The EEOC has stated that in the context of a fetal protection policy, the BFOQ defense "should be read narrowly." EEOC Policy Guidance, supra note 23, at D-3. Employment decisions regarding women based on "stereotyped characterizations of the sexes" or

(footnote continued)

rely on the BFOQ exception only by proving 'that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" Id., quoting Weeks, 408 F.2d at 235. The employer must demonstrate that "the essence of the business operation would be undermined by not hiring members of one sex exclusively," Dothard, 433 U.S. 321, 333, quoting Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (emphasis in original).

(footnote continued)

"assumptions of the comparative employment characteristics of women in general" do not warrant application of the BFOQ defense. 29 C.F.R. § 1604.2(a)(1)(i),(ii) (1989).

Johnson Controls' "fetal protection" policy cannot withstand the test for a BFOQ. First, it does not exclude "all or substantially all women" from allegedly hazardous areas, and it excludes women from areas that are admittedly non-hazardous. Women already working in allegedly hazardous areas and women who prove their sterility can remain in those areas, 886 F.2d 871, 876. At the same time, all fertile women are excluded from a range of completely lead-free environments. Id. at 877. Thus, Johnson Controls' policy is both too broad and too narrow to be justified as a BFOQ.

More importantly, however, Johnson Controls did not and cannot establish that its wholesale exclusion of women

is necessary to "the essence of [its] business operation." Dothard, 433 U.S. at 333. The Pregnancy Discrimination Act and regulations promulgated pursuant thereto make clear that the differing reproductive functions of women and men are not a legal basis for engaging in sex discrimination, and that the only factor involved in employment decisions regarding pregnant employees is their ability or inability to work.[25/] If fertile women could not perform the job for some reason

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25/ The regulations state that the pregnant "employee must be permitted to work at all times during pregnancy when she is able to perform the job", and that "an employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job." 29 C.F.R. § 1604.10, app. A8, A12 (1989).

pertaining to their fertility, the employer might establish a BFOQ. But fertile women unquestionably can perform the jobs at issue and exclusion of fertile women in no way is essential to the business of Johnson Controls.[26/]

The court below incorrectly relied on Dothard v. Rawlinson, where the

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26/ Johnson Controls presented no evidence of any litigation or threat of litigation related to lead exposure. Judge Easterbrook noted that the possibility of "tort judgments means only that female employees' average cost to Johnson [Controls] exceeds that of male employees." 886 F.2d at 914. Higher costs of female employees are not a permissible basis for discrimination. Id. See also, Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). In any event, speculative fear of lawsuits can not be used to justify a discriminatory classification. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552-3 n. 15 (11th Cir. 1984).

employer was able to prove that being male was a BFOQ for those assigned to guard male prisoners because "[t]he [female] employee's very womanhood would ... directly undermine her capacity to provide the security that is the essence" of the job responsibilities at issue in the case. 433 U.S. 321, 336. Here, by contrast, an employee's "very womanhood" is entirely unrelated to the manufacture of batteries and does not undermine her ability to perform the job.

In addition, no security or other risk is posed by an employee's "very womanhood" because women make widely varying sexual and reproductive choices. For example, a woman could be involved with a sterile man, could decide not to be sexually active, could

decide not to be heterosexually active, could use birth control, or could decide that if, despite birth control, she became pregnant during a certain period in her life she would obtain an abortion. For women to become equal participants in the workforce with men, this range of reproductive choices must be recognized. Women must not always and only be treated as potentially pregnant.[27/] Title VII forbids employers from adopting exclusionary policies based on outmoded stereotypes and assumptions, as Johnson Controls

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27/ Moreover, Johnson Controls' policy ignores the fact that many fertile women are unlikely to get pregnant. The birth rate for women age forty has been almost zero. In 1986, there was only a 0.41% probability that a woman between 40 and 44 years of age would give birth. Statistical Abstract, supra note 4 at 62.

has done.[28/]

II. JOHNSON CONTROLS' "FETAL PROTECTION" POLICY IS NOT JUSTIFIED ON GROUNDS OF PUBLIC HEALTH.

Even if this Court were to entertain the notion of expanding the BFOQ defense, or as the court below did, weakening Title VII by permitting a business necessity defense in instances of facial discrimination, Johnson Controls' "fetal protection" policy cannot be justified. First, the exclusion of virtually all women from a wide category of jobs undermines Title VII's goal of equal economic opportunity and exacerbates the economic and health problems of female-headed families, and particularly of children. Second, judicial approval of such exclusionary practices ignores

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28/ Even if a narrowly tailored policy aimed at fetal protection could constitute a BFOQ, summary judgment should not have been granted on the record below. See, EEOC Policy Guidance, supra note 23 at D-3 (requiring employer to prove that there is (1) a substantial risk of harm to offspring through workplace exposure to a hazard; (2) the risk occurs only through the exposure of one sex; (3) its policy minimizes the risk while excluding the narrowest possible group; and (4) there are no reasonable alternatives which are less onerous to women). These burdens were not placed on the employer in this case, and the employer on the record did not satisfy them.

The District Court acknowledged that there was a dispute about material facts: "whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females, as opposed to male workers." Int'l Union, UAW v. Johnson Controls, 680 F.Supp. 309 (E.D. Wis. 1988), aff'd, 866 F.2d 871 (7th Cir. 1989). The record in addition contains disputes among experts on the dangers to fetal health caused by paternal and maternal exposure to lead. At the very least, Johnson Controls did not meet its burden of showing the absence of a

(footnote continued)

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reproductive workplace hazards to men, and operates as a disincentive to cleaning up the workplace in the interests of all citizens.

A. Johnson Controls' Policy Undermines Title VII's Goal of Equal Economic Opportunity

The Johnson Controls policy at issue in this case is extremely broad. It excludes "all women except those whose inability to bear children is medically documented" from all job sites at which either one employee in the past year has had 30 micrograms of lead per deciliter of blood, or in which an air sample of 30 micrograms

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(footnote continued)

material factual dispute on the necessity for a policy so broad that it excludes women from jobs where there is no exposure to lead, 886 F.2d at 877, and applies to women who are not likely to get pregnant.

per cubic meter has been taken in the past year. Int'l Union, UAW v. Johnson Controls, 886 F.2d at 876 n.8. The policy also excludes all fertile women from all jobs that, although not involving exposure to lead, could lead to such exposure "through the exercise of job bidding, bumping, transfer or promotion rights." Id. at 887. The policy thus effectively excludes all women from a broad range of jobs that involve no contact with lead.

Excluding all women from broad categories of jobs limits women's occupational and economic opportunities. If courts permit employers to bar all fertile women, regardless of reproductive choice, from job categories rather than removing hazardous substances, economic

opportunities for women will be dramatically reduced.[29/] Available evidence suggests that so-called fetal protection policies are already having a significant impact on women's employment options. In 1985, the Office of Technology Assessment reported that at least 15 of the Fortune 500 corporations have implemented exclusionary policies that exclude fertile or pregnant women from work allegedly hazardous to reproductive health.[30/] A Massachusetts Public Health survey of chemical and electronics companies found that nearly 20% of responding

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29/ Becker, supra note 7 at 1229-1231.

30/ Reproductive Health Hazards, supra note 17, at 11.

companies excluded workers (almost exclusively women) from certain types of employment based on presumed reproductive health concerns.[31/]

"Fetal protection" policies have been established primarily in industries where women have only recently begun to work or where there is equal competition for jobs from men and women. They are not found in occupations such as nursing and secretarial work, where women are the

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31/ Daniels, et al., supra note 17, at 1. The study found that employers actually knew very little about reproductive hazards and that exclusionary policies often had no relationship to real reproductive risks. Workers were sometimes "protected" from substances that posed no risk to them, while employers were often unaware that other substances in use were hazardous to reproduction. Id. at 1-2.

primary labor force.[32/] For women in or prepared to enter traditionally male-dominated occupations, policies like Johnson Controls' offer them a Hobson's choice: look for another job (often at lower pay) or become sterilized.[33/] The policies thus favor the continued stratification by gender of the labor force, with men in higher-paying jobs and women in lower-paying jobs. This in turn contributes to the poverty and inadequate health care of so many women and female-headed families.

32/ Becker, supra note 7, at 1230, 1238-1240. Paul, Daniels, Rosofsky, Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work, and Health Survey, 16 Am. J. of Indus. Med. 267, 277 (1989).

33/ See, Ashford & Caldart, The Control of Reproductive Hazards in the Workplace, 5 Ind. Rel. L. J. 523, 535 (1983).

As Judge Easterbrook pointed out in his dissent, excluding women from employment on the basis of risks to potential fetuses is a dangerous principle, with limits that are difficult or impossible to define.

> How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risks of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses?

886 F.2d at 917. The principle at stake here goes beyond the examples used by Judge Easterbrook, because Johnson Controls excludes not just all pregnant women, but all fertile women on the basis of purported risks to a possible embryo conceived so recently that the woman does not realize she is

pregnant. Could employers forbid all fertile women to drive cars in connection with their jobs, because of possible injuries to a potential, recently-conceived embryo, before the woman knows she is pregnant?

Women need jobs as much as men do. Reproductive hazards, rather than women, should be removed from the workplace. "Fetal protection" policies like Johnson Controls' reinforce gender-stratification of the workforce by excluding women from nontraditional jobs and by treating women as if they are essentially reproductive vessels whose employment is nonessential. This is contrary to Congress' express purpose in enacting Title VII and the Pregnancy Discrimination Act, and undermines the goal of full

participation in the workforce free from sex discrimination.

B. Johnson Controls' Policy Undermines, Rather than Promotes, Goals of Workplace Health and Safety.

Men's reproductive systems, as well as women's, are at risk from numerous substances commonly used in workplaces.[34]/ Yet so-called fetal prctection policies ignore risks to men's reproductive health. It is true that research about the effects of many substances on men's reproductive systems and on male-mediated reproductive effects is less developed than that regarding female-mediated

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34/ See, Interests of Amici Curiae, supra at 14-18.

reproductive effects.[35] But there is no biological basis for assuming that women or fetuses are more susceptible to all reproductive hazards than are men.[36]

For example, lead, the very substance at issue in this case, is hazardous to men and men's reproductive systems. OSHA, after an exhaustive study, concluded that male exposure to lead can cause:

> a decrease in sexual drive, impotence, decreased ability to produce healthy sperm, and sterility. Malformed sperm (teratospermia), decreased number

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35/ Occupational Health, supra note 17 at 307; Reproductive Health Hazards, supra note 17, at 16-17; Needleman & Bellinger, supra note 20 at 190.

36/ Reproductive Health Hazards, supra note 17, at 68.

> of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur...Germ cells can be affected by lead and cause genetic damage to the egg or sperm.

29 C.F.R. § 1910.1025, app. C, II(5) (1989).[37] At the levels at which Johnson Controls permits men to be exposed to lead, which are the OSHA

37/ OSHA found that: "lead has profoundly adverse effects on the reproductive ability of male and female workers in the lead industry...Lead exerts its effects prior to conception through genetic damage (germ cell alteration), effects on menstrual, and ovarian cycles and decreased fertility in women, decreased libido and decreased fertility in men through altered spermatogenesis...Following birth the child of lead exposed parents may exhibit birth defects, neurological damage and the chances of death within the first year may be increased." 43 Fed. Reg. 52,960 (November 14, 1978). See, United Steelworkers of America v. Marshall, 647 F.2d 1189, 1257 (D.C.Cir. 1980), cert. denied 453 U.S. 913 (1981). See generally, Reproductive Health Hazards, supra note 17, at 67-70.

levels, reproductive hazards to men have been shown.[38] Yet Johnson Controls' policy does not restrict men's exposure to lead to the extent that it restricts women's exposure.

Similarly, while glycol ethers have been shown in human and animal studies to be toxic to sperm, and human exposure has been estimated at 200,000, employers surveyed have restricted certain women, but not men, from contact with these substances.[39] The survey evidence also reveals that females, but not males, are prohibited

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38/ Asthenospermia, for example, has been found at exposure levels of 41 micrograms/100 grams, while medical removal under the OSHA standard occurs at 50 micrograms. 29 C.F.R. § 1910.1025, II.5 (1989).

39/ CDC, supra note 16, at 538, Daniels, et al., supra note 17, at 20, 40.

from holding jobs that may put them in contact with mercury, which is a hazard to both men's and women's reproductive systems.[40]

While empirical evidence is limited, it appears that men, through a combination of circumstances including limited research and employer ignorance, are not protected adequately from reproductive hazards. Apparently where employers consider some substances hazardous to reproductive health and decide to institute stricter policies than those required by OSHA, they preclude only females from having contact with the substances, while men

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40/ Daniels, et al., supra note 17, at 20, 31.

are not similarly protected.[41/]

Furthermore, "fetal protection" policies reduce employer incentives to clean up workplaces, and to develop alternative materials or methods by permitting employers to remove women workers instead.[42/] The OSHA response, by contrast (and the response

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41/ Id. at 40. By contrast, in 1977 when DBCP, which was used both on crops and ornamental plants, was discovered by production workers to be toxic to sperm, men were not removed from jobs involving production or application of DBCP. Instead, OSHA issued an emergency standard protecting workers and the chemical was banned in the continental United States within four years. Occupational Health, supra note 17 at 310: Reproductive Health Hazards, supra note 17, at 199-200; Bureau of National Affairs, Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety, 69-70 (1987).

42/ See, Ashford, Policy Considerations for Human Monitoring in the Workplace, 28 J. Occup. Med. 563, 565 (1986).

of many states), has been to regulate hazards in a gender-neutral fashion. A wide range of measures are available to employers seeking to lower workers' exposure to lead,[43/] but Johnson Controls instead chose to bar virtually all women from employment in relatively high-paying, traditionally male jobs. The Court should not permit these gender-based patterns to continue.

In summary, "fetal protection" policies, particularly those as sweeping and overbroad as the one at issue here, cannot be justified on the basis of public health, for they ignore reproductive risks to men, operate as a disincentive to workplace cleanup, and

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43/ See, Bullock, Lead-Acid Battery Manufacturing, in 3 Industrial Hygiene Aspects of Plant Operations 599-633 (L.V.Cralley & L.J.Cralley, eds. 1985).

force women and their children into poorer economic situations which, as amici have discussed in their statement of interest, in turn have a host of adverse health consequences. As Judge Cudahy asked in his dissent,

> What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk?

886 F.2d at 902. In fact, according to the National Center for Children in Poverty, children of the former group are at greater risk of impaired health than other children.[44/]

44/ Ironically, poor children are at greater risk of harm from exposure to lead, the substance of concern to Johnson Controls. Poor children are exposed to higher doses of lead in their environments than are other

(footnote continued)

Removing all fertile women workers from jobs with possible lead exposure is not an acceptable solution to the problem of exposure to lead of pregnant women. Rather, the answer is to ensure that all workers, female and male, have comprehensive information and training concerning the risks of exposure to lead and other toxic substances, in order to minimize the possibility that parents will conceive and bear children who are harmed by their parents' workplace chemical exposure.

The Court below appeared to interpret the fact that between 1979 and 1983 at least six women became

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(footnote continued)

children, and the average blood concentration of lead among children from six months to five years increases as the family income decreases. Five Million Children, supra note 7 at 51, 54.

pregnant while working at Johnson Controls as evidence of women's lack of responsibility regarding the risk to their children's health, stating "..it would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure." 866 F.2d at 897.[45/] As Judge Posner noted in his dissent, however, during

45/ At oral argument, Johnson Controls presented a defense to their policy that the company is "morally required to protect children from their parents' mistakes." 866 F.2d at 912, (Easterbrook, J., dissenting). As Judge Easterbrook noted, however: "No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of the living woman, and that the only acceptable level of risk is zero." 866 F.2d at 913.

that period of time, the company did not provide adequate information to its workers concerning the risk of lead exposure; rather, it gave a warning which "...was one more likely to allay than to arouse concern." 886 F.2d at 907. Employers are now required to provide their workers comprehensive information concerning reproductive hazards. [46/]

46/ Under the federal hazard communication standard promulgated by OSHA in 1983, employers must provide training and information to their employees on workplace reproductive hazards. 29 C.F.R. § 1910.1200, 1200(c)(1989). Even before the hazard communication standard was promulgated by OSHA, states throughout the country had enacted "right to know" laws, evidencing the concern of the states for the potential health impacts of toxic chemical exposure to workers and their children. By 1985, 25 states had such laws. Bureau of National Affairs, Right-to-Know: A Regulatory Update on Providing Chemical Hazard Information (1985). Although state right to know

(footnote continued)

If employers comply with the law, both male and female workers who are considering parenting will now be in a position to make informed choices to guard the health of their children. Undoubtedly most will decide not to parent while they are exposed to toxic chemicals which could harm their children. In those situations where workers do wish, nonetheless, to parent, they should have a right to request a reasonable accommodation if they are planning to conceive or bear

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(footnote continued)

laws are now preempted in the private sector by OSHA's hazard communication standard, U.S. Steelworkers v. Auchter, 763 F.2d 728 (3d Cir. 1985), workers in all states are now entitled to information and training under the federal standard.

children.[47/] Such a reasonable accommodation duty might be the best means to accomplish the twin goals of protecting the health of workers and their children, and of securing equal economic opportunity. With such requirements, an employer has an incentive to remove reproductive hazards from workplaces. At the same time, the goal of economic equality

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47/ Such accommodation could consist of transfer to a job not having contact with the material, or provision of special protective gear. Where no on-the-job accommodation is possible, a temporary leave with retention of benefits might be called for.

This concept has a precedent in the OSHA lead regulations which provide that an employee who desires advice "regarding lead exposure and the ability to procreate a healthy child" has a right to a medical examination, and state that the examining doctor can "tailor special protective procedures to the needs of individual employees," including special needs of pregnant employees. 29 C.F.R. § 1910.1025 app. C pp. 179, 182 (1989).

between the sexes would be furthered, as women would be able to participate in the workplace equally with men.

CONCLUSION

The Johnson Controls policy at issue in this case, and policies like it, are harmful to the states' interest in the economic well-being of women and children. Sex discrimination, particularly on this scale, undermines women's economic and social status and contributes to a gender-stratified workforce. Broad exclusions of women from jobs they need also harm the states' interest in workplace health by failing to protect men's reproductive systems, and by eliminating employer incentives to remove hazards from the job site.

It contravenes the goals of Title VII for employers to exclude fertile women from jobs they are able to perform. And contrary to Johnson Controls' contention, its "fetal protection" policy is not justified under the BFOQ defense. Nor does the policy promote public health. At the very least, summary judgment should not have been granted for the defendant on this record. Amici states therefore urge this Court to reverse the judgment of the court below and either remand for further proceedings or direct the entry of a judgment for the petitioners.

Respectfully submitted,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL WOMEN'S LAW CENTER, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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BRIEF FOR EQUAL RIGHTS ADVOCATES, *ET AL.*, AS AMICI CURIAE

This brief amici curiae is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF AMICI CURIAE AND PARTY SUPPORTED

The statement of the Interest of Amici is included in the Appendix. This brief supports the UAW, *et al.*, Petitioners.

SUMMARY OF ARGUMENT

The Seventh Circuit erred in omitting any discussion of the legislative history of the Pregnancy Discrimination Act (PDA), which makes clear that the PDA was intended to prohibit the Johnson Controls' policy of excluding all fertile women from employment based on their pregnancy or potential pregnancy.

In enacting the PDA, Congress was fully informed that its language would prohibit a policy of "refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child," and enacted the PDA without change and with full understanding of its reach. The Chamber of Commerce informed both the House and Senate that the second clause of the PDA, requiring that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," would prohibit such policies. Senator Hatch explored the topic with Dr. Andre Hellegers, who urged that "if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three" in order to protect the children of both male and female workers. Dr. Hellegers also discussed the harm that could flow from denying

income to pregnant workers; he documented an increase in premature births, with accompanying risks of mental retardation and learning disabilities, that was associated with a decrease in the pregnant worker's income. Dr. Hellegers' views prevailed, for while Senator Hatch was the leading proponent of narrowing amendments to the PDA, he did not attempt to accommodate the Chamber of Commerce's "fetal protection" concerns.

In defining the term "sex" as it appears in Title VII to include "pregnancy, childbirth, or related medical conditions," Congress chose the broadest possible definition of pregnancy-related discrimination. Since the ability to become pregnant and bear children is a "medical condition" which is "related" to pregnancy and childbirth, the PDA explicitly prohibits the Johnson Controls' ban on all women who are either pregnant or who might become pregnant. The legislative history of the PDA, including the witnesses who testified, the Committee Reports, and the floor debate, overwhelmingly confirm that view. They all documented the source of pregnancy discrimination as including employers' attitudes about women's *capacity* for childbearing and their *potential pregnancies*, which led to discrimination against both pregnant women and women who might become pregnant. They made clear that refusing to hire women for such reasons would be illegal. Thus, in refusing to employ any woman who is pregnant or who might become pregnant, Johnson Controls engaged in a *per se* violation of Section 703(a) of Title VII, as amended by the PDA definition, which the Seventh Circuit erred in refusing even to discuss or acknowledge.

The Seventh Circuit also erred in ruling that fetal health concerns can be taken into account in deciding whether Johnson Controls established a Section 703(e) bona fide occupational qualification (BFOQ) defense to its facial violation of Title VII. The second clause of the PDA applies equally to the Section 703(e) defense, and requires that the BFOQ decision be grounded solely in the job performance criterion of an employee's "ability

or inability to work," as the Chamber of Commerce understood. The testimony, Committee Reports, and floor debate all make clear that Congress intended that under the PDA, in Representative Hawkins' words, "if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs." As a matter of law, therefore, under the PDA there can be no BFOQ defense based on fetal heath concerns. Instead, the sole criterion for establishing a BFOQ is the employee's job performance abilities.

Title VII, as amended by the PDA, requires that employers adopt sex-neutral policies applying equally to both male and female workers; such policies will enable the employer genuinely concerned with fetal health to make the workplace safe for the children of both male and female employees. Such policies will also avoid the scientific irrationality of ignoring the effects of male workers' exposure to lead. The Occupational Safety and Health Administration has found "conclusive evidence of miscarriage and stillbirth in women . . . whose husbands were exposed" to lead. These problems can arise through the effect of lead on sperm and through male workers failing to exercise proper hygiene, thus carrying home lead on their bodies and clothes and affecting the fetus of their wives through intimate contact. Stereotypes make it easy for employers to ignore the role of men in the area of fetal health and to ignore the role of women in assuring adequate family income. These were precisely the kinds of stereotypes that the Pregnancy Discrimination Act was designed to eradicate from the workplace.

ARGUMENT

:TING THE PREGNANCY DISCRIMINA-T, CONGRESS INTENDED TO MAKE A OF EXCLUDING ALL FERTILE WOMEN MPLOYMENT BASED ON THEIR PREGNANCY OR POTENTIAL PREGNANCY A FACIAL VIOLATION OF SECTION 703(a) OF TITLE VII.

The Seventh Circuit's decision upholding the Johnson Controls' policy of refusing employment to all pregnant women and all women capable of becoming pregnant scarcely mentioned the Pregnancy Discrimination Act of 1978.[1] Even more conspicuously absent from the Seventh Circuit's decision is any analysis of the legislative history of the PDA. That legislative history reveals, however, as we show below, that Congress intended to prohibit precisely the employer ban on fertile women workers that the lower court upheld.

A. Congress Explicitly Considered the PDA's Impact on the Johnson Controls-Type Policy, Understood That the PDA's Language Prohibited Such Policies, and Enacted the PDA Without Change and With Full Understanding of Its Reach.

On the very first day of testimony (April 6, 1977) on the proposed PDA, the first opponent of the legislation to speak highlighted as his first reason for opposing the bill its effect on "Occupational Health." In both his oral and written statements, the Chamber of Commerce representative explained to Chairman Hawkins and the other Members of the House Subcommittee on Employment Opportunities:

> [The bill] requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such

[1] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified in part at 42 U.S.C. § 2000e(k) (1982)) [hereinafter cited as the PDA].

> work posed a threat to the health of either the mother-to-be or her unborn child.
>
> Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, Part 1, 95th Cong., 1st Sess. 84, 88 (1977) [hereinafter cited as *House Hearings*] (statement and testimony of C. Brockwell Heylin, labor relations attorney, Chamber of Commerce of the U.S.). The Chamber submitted a virtually identical statement to the Senate Subcommittee on Labor the next month. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 482 (1977) [hereinafter cited as *Senate Hearings*] (statement of C. Brockwell Heylin). Thus, from the opening days of the Congressional hearings, Congress was on notice that the largest U.S. association of business and professional organizations, *id.*, believed that the second clause of the PDA[2] prohibited a policy virtually identical to the Johnson Controls' policy, and that the Chamber opposed the bill for that reason.

Senator Hatch, who later became the leading (though unsuccessful) proponent of amendments to narrow the scope and coverage of the PDA, quickly pursued the Chamber's points. On the very first day of the Senate hearings (April 26, 1977), Senator Hatch explored them

[2] The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e (k) (1982).

with Dr. Andre Hellegers, a Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics at Georgetown University. Senator Hatch's questions were based on the Chamber's points about the PDA's second clause and occupational health:

> Senator Hatch: *What problems, if any, do you foresee in treating pregnant women the same as other employees* who have disabilities that continue to work?
>
> Dr. Hellegers: I can see none. I don't see any. I think it is just a question of having a physical exam.
>
> Senator Hatch: Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?
>
> Dr. Hellegers: Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But *you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three*, and we aren't doing much of that.

Senate Hearings at 67 (emphasis added).

With this vivid and cogent remark, Dr. Hellegers struck at the heart of the stereotype underlying the Johnson Controls-type policy: that *male* participation in the reproductive cycle is irrelevant to fetal harm and may therefore be disregarded.[3] What Dr. Hellegers recommended instead was to examine fetal harm caused by *both* male and female worker exposure to chemicals and other agents, so that the children of both men and women employees could be protected.

[3] See Section III *infra* for a discussion of the scientific data showing that the sperm of male workers can be affected by their exposure to lead, thus leading to fetal harm, and for a discussion of how male workers who fail to take the appropriate hygiene measures after exposure to lead on the job can bring home lead on their bodies and clothes and affect the developing fetus of their wives through intimate contact. The Johnson Controls-type stereotype undoubtedly arises because of the centrality and strength of the mother-infant relationship in our culture, leading employers simply to forget about fathers. This is especially so during pregnancy, when the fetus is enclosed in the woman's body, and the father's connection to the fetus has no such visible and obvious manifestation.

The tendency to ignore the father's role in causing fetal harm was noted by the California Court of Appeal in discussing one of Johnson Controls' expert witnesses: "Dr. Noren cavalierly characterized the situation this way: 'If you don't look for a problem, you don't find it.'" *Johnson Controls, Inc. v. California Fair Empl. and Hous. Comm.*, 218 Cal. App. 3d 517, ——; 267 Cal. Rptr. 158, 168 (1990), *petition for rev. denied*, No. S014910 (Cal. May 17, 1990) (LEXIS, States library, Cal. file). Dr. Noren took this position to explain his belief that there was a lack of recent studies on the "effect of lead in male workers' reproduction systems," despite his recognition that "old studies did link lead exposure in male lead workers with *a high death rate among offspring in the first years of life*." *Id.* (emphasis added).

Shortly before this exchange, Dr. Hellegers' testimony dealt with another stereotype underlying the Johnson Controls-type policy: that the denial of jobs to pregnant women will not harm developing fetuses. The mother's *income* is important to fetal well-being, he explained:

> I am secondly in favor of this bill on the grounds of social good, and I have attached to my testimony a table on a study that we did in the Kennedy Institute which relates income to infant outcome. It is extremely clear that as income increases prematurity decreases, in some instances by almost 50 percent.
>
> What this means, in other words, is that the penalty of this kind of policy [loss of income during pregnancy] is paid not just by the woman, it is paid by the unborn child. One lawyer, incidentally, in one

case afterwards said the women can always get aborted. I happen to be opposed to abortion. All I can say is that this is a policy which harms not only women but harms the unborn, either whether you abort or you do not abort, and markedly increases the incidence of prematurity.

That goes to the issue of cost because what it really comes down to is that you pay a penalty either before birth by keeping income up at that time, or you pay a penalty after birth in terms of facilities for the mentally retarded, learning disabilities on which millions and millions are spent in this country.

Senate Hearings at 64. His written statement amplified on these concerns:

> The National Institute for Child Health and Human Development has estimated that prematurity costs the nation $1 billion per year. A task force report to Secretary of H.E.W. Califano puts a price tag of $130 million on each percentage point of prematurity in the nation. Those costs refer to the cost of care in hospital nurseries only. *They do not reflect the well known relationship between premature births and subsequent central nervous system disabilities, such as mental retardation and learning defects.* Its cost is immense. . . .
>
> . . . On a national scale one does well to remember that today *40% of all pregnant women work* and large numbers of them are heads of households or have unemployed husbands so *their loss of income affects* their own health and *their unborn children's*, at great cost to the nation. . . .

Senate Hearings at 75-76 (emphasis added). Dr. Hellegers made the identical point in the hearings before the House Employment Opportunities Subcommittee. *House Hearings* at 54, 58-59.[4]

[4] The American Nurses' Association also documented the connection between loss of income and fetal health, and expanded on the fetal and neo-natal harms caused by premature birth. "Low birth weight [due to premature birth] is associated with almost half of all infant deaths and substantially increases the likelihood of birth defects," the Association informed the Senate. *Senate Hearings* at 466, 470. Some of the defects listed were "mental retardation, cerebral palsy, and other neurological disorders." *Id.* at 471. Others included "IQ deficiency and antisocial behavior." *Id.*

On the same day that Senator Hatch explored the OSHA problems with Dr. Hellegers, he explored several of the concerns that led him later to offer his narrowing amendments. For example, he asked a panel of government witnesses (from the EEOC, the Justice Department's Civil Rights Division, and the Labor Department) a series of questions about whether the bill should contain limitations on the "length of time" during which pregnant workers could receive disability insurance coverage—*e.g.*, of "3 weeks for pregnancy disability." *Senate Hearings* at 39-45.

Later that day, the Senator returned to his concerns about limiting the "length of time" for receipt of disability insurance benefits and about possible OSHA problems in a discussion with Clarence Mitchell, the Chairman of the Leadership Conference on Civil Rights. He explained to Mr. Mitchell that

> maybe there should be some limitations so people know where they stand and that does literally bother me. There are many problems that arise in this. It is a complicated area.
>
> If we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should. These are questions I legitimately have and want to have answers. But since the vast majority of insurers in America put a set time because of the overwhelming mass of statistical evidence showing that pregnancy is not really a disability but a natural occurrence in the overwhelming majority of cases that perhaps there might need to be a limitation rather than an unlimited generalized bill.

Senate Hearings at 109-10.

Significantly, during the floor debate, Senator Hatch did indeed offer an amendment to cap disability benefits at 6 weeks, and thereby attempted to limit the "length

of time" for which women workers who had had babies could receive disability benefits. He also proposed other amendments to cover other concerns he had raised from the first day of the Senate hearings.[5] Senator Hatch did not, however, propose an amendment to allow employers with occupational health concerns to treat fertile women differently than fertile men, by excluding the women from employment. He was apparently persuaded by Dr. Helleger's point that it is important to examine the effects of toxic agents on men as well as women, in order to protect male workers' children and not just those of female workers. He may also have been persuaded by Dr. Hellegers' eloquent statement about low income among pregnant women workers causing premature birth, with its attendant risks of learning disabilities and mental retardation. Whatever his motivation, however, the significant fact remains that he was clearly informed about the occupational health issue the Chamber of Commerce so prominently raised, and knew which clause of the PDA the Chamber was concerned about. Yet he chose not even to suggest amending the PDA to accommodate the Chamber's concern, despite his role as the leading proponent of narrowing amendments to the PDA.

In sum, despite the Chamber of Commerce's clear warning that the second clause of the PDA "would prevent

[5] His proposed amendments included: 1) the six-week limitation on pregnancy disability benefits discussed *supra* (Amendment No. 830) (rejected), Senate Comm. on Labor and Human Resources, *Legislative History of the Pregnancy Discrimination Act of 1978*, 96th Cong., 2d Sess. 56, 96-111, 122-24 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*]; 2) an amendment to clarify that a requirement of covering pregnancy in insurance plans did not apply to pre-existing conditions (Amendment No. 831) (withdrawn), *id.* at 57, 82-84; and 3) an extension of the date of compliance (Amendment No. 832) (adpoted), *id.* at 58, 84-86. Senator Hatch also discussed the enactment of a special pregnancy bill instead of an amendment to the Civil Rights Act, although this suggestion never materialized into a proposed amendment. *See Senate Hearings* at 44.

an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child," and despite the fact that a highly visible Senator who offered other narrowing amendments publicly examined the Chamber's concerns, Congress left intact its requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." And in the entire legislative history of the PDA, no person or organization ever suggested to Congress that a different interpretation of this statutory language than the one offered by the Chamber applied to the occupational health problem. Nor did a single Member of Congress or a single Committee Report indicate any disagreement with the Chamber's interpretation.

Moreover, two important Senators were clearly influenced by Dr. Hellegers' approach of being concerned about the health of all children.[6] Senator Williams, the Chairman of the Senate Committee on Human Resources, had been present during Dr. Hellegers' Committee testimony and during Senator Hatch's questioning of Dr. Hellegers. When the Senator presented the bill to the full Senate in his role as floor manager, he pointedly focused on and used Dr. Hellegers' testimony at the very beginning of the PDA floor debate:

> Finally, Mr. President, I want to emphasize testimony received by the Committee from the American

[6] Indeed, fetal health had been the subject of concern in the Congressional session immediately preceding the one in which the PDA was introduced. The Toxic Substances Control Act, 15 U.S.C. §§ 2601, 2603 (1988), enacted on October 11, 1976 specifically addressed concerns for fetal safety by imposing strict reporting and testing requirements on industry in the production and use of teratogens and other toxins which present health and environmental hazards. Clearly such concerns were still fresh in the minds of the Members of Congress who began consideration of the PDA less than six months later.

Nurses' Association,[7] and from an eminent obstetrician, *Dr. Andre Hellegers*, which *documented the concrete connection between loss of income* during the disability phase of pregnancy *and a deterioration of the health* of the pregnant woman and *of her child* which results from impaired access to a healthful life situation.

In addition, there is a relation ship between infant prematurity and income. It is estimated that prematurity costs the Nation $1 billion per year for care and hospital nursing alone, not to mention *the cost of certain lasting effects which can result from prematurity.*

These problems can affect an enormous number of our Nation's children. *Approximately 40 percent of all pregnant women work* and, as we know, a large number of them are heads of households, or have unemployed or low-income husbands. . . .

> . . . We *must also consider the cost which is imposed on society when working women* and their families *are denied adequate income* for a decent standard of living. *This cost is felt in terms of medical complications for* both the women and *their children.* . . .

Leg. Hist. at 65, 66 (emphasis added). Senator Williams' remarks were soon followed by those of another influential member of the Committee reporting out the bill, Senator Kennedy. Senator Kennedy told the Senate:

> *Since women work to support their families, depriving them of such coverage* at a time they and their families are very much in need of it *discriminates* not only against these women but *against their families* as well. *This discrimination handicaps children* who are born into families where a paycheck—possibly the only paycheck—has arbitrarily vanished.

Senate Floor Debate, *Leg. Hist.* at 70 (emphasis added). Surely these remarks reflect the Senators' agreement with Dr. Hellegers' position that anyone with true concern for fetal harm would not bar pregnant women from working and would be sure to look at the impact of toxic chemicals

[7] *See* n.4, *supra.*

on the male reproductive system. Instead, such persons would make sure that employment environments would be safe for the children of both the male and female workers who might be exposed to toxic substances, by reducing the toxic substances to safe levels or taking other appropriate measures.

B. Congress Made Clear That the PDA's Prohibition on Pregnancy-Based Discrimination Had the Broadest Possible Application to All Pregnancy-Related Policies, Rendering Them *Per Se* Violations of Section 703(a) of Title VII.

The Johnson Controls' fetal protection policy, adopted in 1982, prevents all women who are "capable of bearing children" from working in "jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." *International Union, UAW v. Johnson Controls*, 886 F.2d 871, 877 (7th Cir. 1989). The only women who are exempted are those who can prove, with medical documentation, that they are infertile. *Id.* at 876 n.8. Thus, all pregnant women and all women who might ever become pregnant are excluded from work in this group of jobs. Conversely, no men are excluded from these jobs. Even fertile men are permitted to work in a job in which they might be exposed to lead.

In defining the term "sex" as it appears in Title VII to include "pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000e(k) (1982), Congress chose the broadest possible definition of pregnancy-related discrimination. The definition does not stop with pregnancy and childbirth, but is expanded to include any "related medical conditions." Since the ability to become pregnant and bear children is surely a "medical condition" which is "related" to pregnancy and childbirth, the PDA explicitly prohibits the Johnson Controls' ban on all women who are either pregnant or who might become pregnant.[8]

[8] The expansiveness of the definition is further demonstrated by the second clause, which extends its reach to all "women *affected*

The legislative history of the PDA overwhelmingly confirms that view. The witnesses who testified before the relevant Committees, the Committee Reports, and the floor debate all reflected a single, unanimous, perspective. First, the source of pregnancy discrimination was employers' attitudes about women's *capacity* for childbearing and their *potential* pregnancies, and these attitudes led to discrimination against both pregnant women and women who might become pregnant. Second, the PDA should ban all such discrimination.

This perspective was developed from the very first day of hearings and the opening panel of witnesses. The lead panel included the Co-Chair of the Campaign to End Discrimination Against Pregnant Workers (a broad-based coalition of women's rights organizations, civil rights groups, labor unions, and other public interest groups working to enact the PDA) and a law professor who worked closely with the Campaign. Professor Wendy W. Williams' statement started by describing the history of protective labor laws and their relationship to attitudes about pregnancy. As the prime example, she quoted from this Court's holding in *Muller v. Oregon*, 208 U.S. 412, 421 (1908), justifying restrictive labor laws for women only on the early "fetal-protection" theory that since "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[9] She then recounted the history of employers' policies towards pregnancy and summarized that history in the following terms:

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by . . . related medical conditions," 42 U.S.C. § 2000e(k) (1982) (emphasis added), as the House Report agreed. *See* text at n.10, *infra*.

[9] *House Hearings* at 6 (statement of Wendy Williams); *Senate Hearings* at 124 (same). This quote should be read in light of the Court's position that women were properly placed in a class by themselves because of their "physical structure" and "performance of maternal functions." *Muller v. Oregon*, 208 U.S. at 420.

> [T]he common thread of justification running through most policies and practices that have discriminated against all women in the labor force rested ultimately on *the capacity of women to become pregnant* and the roles and behavior patterns of women that were assumed to surround that fact of pregnancy.
>
> . . . .
>
> . . . Moreover, *even women who don't actually become pregnant are, until they pass childbearing age, viewed by employers as potentially pregnant* and all women are subject to the effects of the stereotypes that women are marginal workers with all the multifaceted consequences this has for hiring, job assignment, promotion, pay, and fringe benefits.

House Hearings at 11-13, 43 (statement and testimony of Wendy Williams) (emphasis added). The Campaign's Co-Chair made a similar point:

> The Campaign supports H.R. 5055 because it will restore Title VII as an effective tool in eradicating sex discrimination in employment. It will reinstate what we believe Congress always intended—that all sex discrimination be eliminated, root and branch, from the market place, *especially including discrimination focussed on that one condition which makes women different from men—their childbearing capacity.*

House Hearings at 32, 47 (statement and testimony of Susan Deller Ross) (emphasis added). Both women made the same points before the Senate. *Senate Hearings* at 113, 118, 129-31, 151.

Other witnesses repeated this theme. The Vice-Chair and Acting Chair of the EEOC explained:

> There can be no question that the wide range of employment policies directed at pregnant women—*or at all women because they might become pregnant*—constitutes one of the most significant hindrances to women's equal participation in the labor market.
>
> . . .
>
> . . . .

> Policies which disadvantage women when they become pregnant—*or even because they might become pregnant*—endanger the limited financial security they now have.

House Hearings at 122-23 (testimony of Ethel Bent Welsh) (emphasis added); *Senate Hearings* at 32.

Drew Days, the Assistant Attorney General in charge of the Justice Department's Civil Rights Division, testified that "loss of income and employment opportunities, and limitations on reinstatement rights all operate to make women, whether pregnant, *potentially pregnant*, or formerly pregnant, second-class citizens in the employment sphere." *Senate Hearings* at 56 (statement) (emphasis added); *House Hearings* at 135. Laurence Gold, Special Counsel for the AFL-CIO, noted that "the overall affect [sic] of the special disadvantages imposed on pregnant women, *and women workers because they might become pregnant*, is to relegate *women in general*, and pregnant women particularly, to a second-class status with regard to career advancement and continuity of employment and wages." *Senate Hearings* at 209 (statement) (emphasis added); *House Hearings* at 65. Ms. Ruth Weyand, also a Co-Chair of the Campaign, explained that "employers rely on pregnancy to justify all forms of discrimination against women . . . *Unfair treatment because of potential pregnancy*, actual pregnancy, or recent pregnancy touches [women workers] at every point, and they feel very, very deeply the need to say that discrimination because of pregnancy is discrimination because of sex. *Senate Hearings* at 300-01 (testimony) (emphasis added). Senator Clark stated that he was cosponsoring S. 995

> because it is clear to me that discriminating against working women *on the narrow basis of their capacity to become pregnant* is not consistent with the goals set forth in the Civil Rights Act. . . . The significance of this legislation is that it deals with one of the most important causes of employment discrimination against women; namely, the age-old belief that a

> woman's primary role is to give birth and to care for the children.

Senate Hearings at 393-95 (testimony) (emphasis added).

Faced with this overwhelming consensus that the Act must eradicate practices based on women workers' capacity to become pregnant, both the Senate and House Committee Reports made absolutely clear that the Act would have this effect. The Senate Report first described this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and then stated:

> In the committee's view, the following passages from the two dissenting opinions in the case correctly express both the principle and the meaning of title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that *a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'*." Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; *for it is the capacity to become pregnant which primarily differentiates the female from the male*."
>
> Thus, S. 995 was introduced to change the definition of sex discrimination in title VII to reflect the "commonsense" view and to insure that working women are protected against all forms of employment discrimination based on sex.

S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1978) [hereinafter cited as S. Rep.], *Leg. Hist.* at 39-40 (emphasis added). The House Report agreed that "the dissenting Justices correctly interpreted the Act," and expressly quoted Justice Stevens' point about the "capacity to become pregnant." H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. 2 (1978) [hereinafter cited as H.R. Rep.], *Leg. Hist.* at 148. It went on to specify that "in using the broad phrase 'women affected by pregnancy, childbirth, and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process." [10] *Id.* at 151. And it expressly referred to the historical patterns:

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[10] *See* n.8, *supra*.

> [T]he consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. *Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant.* Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women. . . .

H.R. Rep. at 6-7, *Leg. Hist.* at 152-53 (emphasis added).

Both Senator Williams and Representative Hawkins, the chairmen respectively of the Senate Committee on Human Resources and the House Subcommittee on Employment Opportunities, repeated these points in their presentations to the full Congress. Senator Williams pointed out that:

> *Because of their capacity to become pregnant,* women have been viewed as marginal workers. . . .
>
> The reported title VII cases reveal a broad array of discriminatory practices based upon erroneous assumptions about pregnancy and the effect it has on the capacity of women to work.
>
> In some of these cases, *the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant,* even though the evidence revealed that pregnant women are perfectly capable of performing the work in question.
>
> . . . .
>
> [T]he overall effect of discrimination against women *because they might become pregnant,* or do become pregnant, *is to relegate women in general,* and pregnant women in particular, to a second-class status with regard to career advancement and continuity of employment and wages.
>
> These practices reach *all working women of childbearing age.*

Senate Floor Debate, *Leg. Hist.* at 61-62 (emphasis added). Representative Hawkins spoke in a similar vein in presenting the bill to the House of Representatives: "many of the disadvantages imposed on women are predicated upon *their capacity to become pregnant.*" House Floor Debate, *Leg. Hist.* at 168 (emphasis added). And in the moments before final passage of the legislation, when a compromise had been reached on the abortion issue,[11] even the concluding speaker addressed these same concerns, in words that speak directly to the Johnson Controls' policy:

> The legal status of the past often forced women to choose between having children and working. For many, wanting children could not outweigh the economic realities that her income was essential. This legislation gives her the right to choose both, to be financially and legally protected *before,* during, and after her pregnancy.

Leg. Hist. at 208 (comments of Rep. Sarasin) (emphasis added).

In the face of this overwhelmingly consistent legislative history, there simply can be no doubt that Congress intended to proscribe broadly-defined employer policies such as that used by Johnson Controls. In refusing to employ any woman who is pregnant or who might become pregnant, the company has engaged in a *per se* violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1982), as amended by the PDA's definition that sex includes "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982). The Seventh Circuit clearly erred in refusing even to discuss or acknowledge this language and history.

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[11] *See* Section III *infra* for a discussion of the abortion issue.

II. BECAUSE THE PDA'S SECOND CLAUSE AND ITS LEGISLATIVE HISTORY MADE CLEAR THAT THE PREGNANT WOMAN'S OWN JOB PERFORMANCE ABILITIES, AND NOT FETAL HEALTH CONCERNS, ARE THE ONLY RELEVANT CRITERIA FOR ESTABLISHING A BFOQ, JOHNSON CONTROLS HAS NO BFOQ DEFENSE TO ITS FACIAL VIOLATION OF SECTION 703(a).

Without discussing any of the relevant statutory language or legislative history of the PDA, the Seventh Circuit erroneously held that the PDA allowed it to take account of fetal risks in determining whether Johnson Controls had a Section 703(e) BFOQ defense to its policy of banning all fertile women from employment. Its sole PDA discussion was as follows:

> In the context of the Pregnancy Discrimination Act, application of the bona fide occupational qualification defense requires a court to consider the special concerns which pregnancy poses. A proposed BFOQ relating to capacity for pregnancy (or actual pregnancy) will exclude fewer employees than a BFOQ excluding all women. *The court must also consider the physical changes caused by pregnancy, i.e., the presence of the unborn child, in determining whether the employee's continuance in a particular employment assignment will endanger the health of her unborn child.*

Johnson Controls, 886 F.2d at 893-94 (footnote omitted) (emphasis added). This conclusion is flatly contradicted by the PDA and its legislative history.

The BFOQ exception of Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1982), must be read in light of the second clause of the PDA. Just as the first clause of the PDA (defining "sex" to include "pregnancy, childbirth, or related medical conditions") applies throughout Title VII wherever the term "sex" is found, so too does the second clause. Thus, it applies equally to the BFOQ section, and indeed gives content to the application of the BFOQ in the pregnancy context.

The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for *all* employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1982) (emphasis added). It was precisely this clause that the Chamber of Commerce identified as preventing "an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of . . . her unborn child." *House Hearings* at 84; *Senate Hearings* at 482.

The legislative history reveals that the Chamber's assessment was correct, because of the clear meaning of the term "ability or inability to work." At the beginning of both Committee hearings, the Co-Chair of the Campaign to End Discrimination Against Pregnant Workers explained this core concept of the legislation:

> [The bill] defines the appropriate standard for eliminating . . . discrimination [based on pregnancy, childbirth, and related medical conditions], by providing that pregnant workers who are able to work shall be treated the same as other able workers, and that pregnant workers who are unable to work shall be treated the same as other disabled workers.
>
> . . . .
>
> The point here is that no conclusions about a woman's *medical ability to work* can be drawn from the fact of pregnancy *per se*. *Most women are able to work through most of their pregnancies* (although less than 5% do suffer some complications that prevent them from working). *Those pregnant women who are able to work should be allowed to work like all other able workers.* Conversely, all pregnant women have some period of *medical disability*, beginning in a normal pregnancy with *labor itself and continuing through the normal recuperation period of 3 to 8 weeks after childbirth.*

Senate Hearings at 151-52, 153 (statement of Susan Deller Ross) (emphasis added); *House Hearings* at 32-33, 34. Clearly, the focus of the suggested standard was

on the effect of the woman's pregnancy on her ability to perform job duties, and the standard contemplated that any woman who was physically able to perform her job duties should be allowed to do so. The references to "medical ability to work" and the examples of medical inability to work—including labor itself, the 3 to 8 weeks recuperation period after childbirth, and complicating medical conditions of pregnancy affecting less than 5 percent of all pregnant women—particularly clarify that the ability to work concept refers to the woman's individual ability to perform her job duties.

Different employer stereotypes could affect employers' decisions to forbid pregnant women to work despite their ability to do so. Professor Williams discussed a variety of such stereotypes in her testimony, and specifically included that of "fetal protection," in describing a Children's Bureau study from the early 1940's which examined "the practice of firing women when they become pregnant." *House Hearings* at 9; *Senate Hearings* at 127. The study noted that "the reason often given for the practice was the protection of the mother and fetus." *Id.*

The theme of equal treatment based on comparable ability to work—that is, job performance ability—was reiterated in the Committee Reports and the floor debate. Thus, the Senate Report stated:

> By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. *Pregnant women who are able to work must be permitted to work on the same condition as other employees; and when they are not able to work for medical reasons*, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.

S. Rep. at 4, *Leg. Hist.* at 41 (emphasis added). In explaining when disability benefits would have to be paid, the Report clarified that they would be paid "only on the same terms applicable to other employees—that is, generally, only when the employee *is medically unable to work.*" *Id.* (emphasis added). Examples of times when workers would *not* have to be paid disability benefits because they were not medically disabled included a pregnant woman who "wishes, *for reasons of her own*, to stay home to prepare for childbirth, or, after the child is born to care for the child." *Id.* (emphasis added). And while disability benefits would normally be paid for "4-8 weeks" after childbirth, since that is "the period of disability for a normal pregnancy," on the other hand, "if there are medical complications of pregnancy or childbirth which prevent a woman from working for more than the normal period, the entire disability period . . . would have to be covered." S. Rep. at 4, *Leg. Hist.* at 41-42.

Similarly, in discussing employers' leave policies, the Report pointed out, in language that could apply directly to the Johnson Controls' policy, that "employers will no longer be permitted to force women who become pregnant to stop working *regardless of their ability to continue*; . . . and they will not be able to refuse to hire or promote women simply because they are pregnant." S. Rep. at 6, *Leg. Hist.* at 43 (emphasis added).

The House Report contained virtually identical discussions. *See* H.R. Rep. at 4-5, *Leg. Hist.* at 150-51. And like the Senate Report, the House Report specifically rejected "mandatory leave for pregnant women *arbitrarily established at a certain time during their pregnancy and not based on their inability to work.*" H.R. Rep. at 6, *Leg. Hist.* at 152 (emphasis added).

While the Committee Reports alone would be decisive on the point that it is solely the pregnant woman's job performance abilities that count in determining employer rights to force her into unemployment, the statements of the two floor managers during the floor debates reempha-

size the unified approach of the Reports. Thus, Representative Hawkins stated:

> [E]mployers . . . must treat pregnant women as they treat other employees similar in their ability or inability to work. This means, for example, that *if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs.*

Leg. Hist. at 24-25 (emphasis added). Senator Williams explained: "[t]he central purpose of this bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work." Senate Floor Debate, *Leg. Hist.* at 62-63.

These statements make clear that, far from allowing courts to consider fetal health concerns which have no impact on the woman's job performance abilities, Congress mandated equal treatment based solely on the pregnant employee's ability to work in comparison to other employees not so affected but similar in their ability to work. In requiring this equality of treatment, Congress intended to prohibit employers from considering anything other than the employee's actual ability to perform the job—concerns about the health of fetuses or potential fetuses are simply not relevant. That was a point that the Chamber of Commerce understood on a first reading of the second clause of the PDA, but which the Seventh Circuit entirely ignored. Accordingly, it erred in ruling that Johnson Controls had established a BFOQ based solely on fetal health concerns; as a matter of law, these concerns cannot justify a BFOQ.

Finally, while Johnson Controls has sought to justify its policy with scientific data, not even the scientific evidence supports a fetal protection policy that excludes only fertile women. As shown below, the Johnson Controls' policy is scientifically irrational.

III. TO PROVIDE FETAL PROTECTION CONSISTENT WITH TITLE VII, JOHNSON CONTROLS MUST ADOPT A SEX-NEUTRAL POLICY THAT APPLIES EQUALLY TO ITS MALE AND FEMALE WORKERS; SUCH A POLICY WILL ALLOW THE EMPLOYER BOTH TO COMPLY WITH TITLE VII AND TO MAKE THE WORKPLACE SAFE FOR THE CHILDREN OF BOTH MALE AND FEMALE EMPLOYEES.

Even though the current Johnson Controls' policy is invalid under Title VII, Johnson Controls has several options if it genuinely seeks to adopt policies consistent with Title VII which also protect the fetus. First, it can study the hazards caused by the exposure of fertile workers of either sex to lead, and adopt a policy which applies equally to all male and female workers. In developing its current policy, the company has focussed only on the exposure to lead of fertile women, and not of fertile men. It discounted, or ignored, studies showing the potential impact of lead on the male reproductive system and the concrete ways in which male exposure could affect fetal development. As the UAW's and other amicus briefs show, the scientific evidence simply does not support a fetal protection policy that applies only to fertile women, and not to fertile men, and that does not consider the harms caused by loss of income.

In 1978, less than a month after enactment of the PDA, the Occupational Safety and Health Administration found:

> There is conclusive evidence of miscarriage and stillbirth in women who were exposed to lead *or whose husbands were exposed.* Children born of *parents either of whom* were exposed to lead are more likely to have birth defects, mental retardation, behavioral disorders or die during the first year of childhood.
>
> . . . .
>
> A. Lead has profoundly adverse effects on the reproductive ability of male and female workers in the lead industry.

B. Lead exerts its effects prior to conception through genetic damage (germ cell alteration), effects on menstrual, and ovarian cycles and decreased fertility in women, decreased libido and decreased fertility in men through altered spermatogenesis.

. . . .

The record in this rulemaking is clear that male workers may be adversely affected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. . . . There is no evidentiary basis, nor is there anything in this final standard, which would form the basis for not hiring workers of either sex in the lead industry.

OSHA, Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 52,951, 52,954, 52,960, 52,966 (1978) (emphasis added). Professor Williams has explained some of the other ways in which the exposure of male workers to lead can affect their children:

> [T]he pregnant woman, and as a consequence, her fetus, can be exposed through a male worker to toxic substances found in the workplace. One well documented way in which such exposure occurs is by male transportation of hazardous substances from work to home on his clothes, shoes, or hair.[12] Another route, theoretically likely but as yet unconfirmed, is exposure of the pregnant woman and fetus through

[12] The footnote for this statement cited "A. Hricko, [*Working For Your Life: A Woman's Guide To Job Health Hazards*] C-8, C-9 [(1976)] (children exposed to lead carried home on parent's clothing . . .); [and] Stellman, [*The Effects of Toxic Agents on Reproduction*, Occ. Health and Safety 36,] 42 [(Apr. 1979)] (exposure to lead carried home on worker's clothing)." *See also* Ashford, *New Scientific Evidence and Public Health Imperatives*, 316 N. Engl. J. Med. 1084-85 (1987) (not only is the male reproductive system at risk but men may carry home lead-contaminated clothing or objects and expose wives and children).

> vaginal absorption of toxic substances carried in the seminal fluid of the exposed male worker.[13]

Williams, *Firing the Woman to Protect the Fetus: Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 657 (1981). These routes of transmission would help explain the studies linking "lead exposure in male lead workers with a *high death rate among offspring in the first year of life*." *Johnson Controls*, 218 Cal. App. 3d at ——, 267 Cal. Rptr. at 168.

Adopting a policy that applies only to women is scientifically irrational if the children of males exposed to lead can also be harmed. Stereotype, not science, best explains why Johnson Controls developed such a policy, for many employers believe that there is an "exclusive connection" between the mother and birth defects, notwithstanding scientific studies and common sense about the male role in reproduction.[14] Moreover, one author has noted that "fertile women will be excluded only from higher-paying, traditionally male jobs and not from lower-paying, traditionally female jobs, even if fetal risks are the same."[15] The author also discussed the pesticide DBCP; when it was linked to infertility and sterility in men, it was banned by the EPA. That suggests a second stereo-

[13] The footnote for this assertion stated:

> J. Manson & R. Simon, *Influence of Environmental Agents on Male Reproductive Failure*, WORK AND HEALTH OF WOMEN 171 (V. Hunt ed. 1979). The authors state: ". . . [D]rugs transmitted via the semen during coitus are likely to enter the systemic circulation of the female. This may constitute a significant route of exposure for the female as well as the embryo." *Id.* at 332-33. *See also* J. Bell & J. Thomas, *Effects of Lead on Mammalian Reproduction in* LEAD TOXICITY 169, 174 (Singhal & Thomas, eds. 1980 ("[T]here may be a passage of lead from the male via the semen which could influence the conceptus directly").

[14] Williams, 69 Geo. L.J. at 660.

[15] Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1257 (1986).

type: male workers must be accommodated because their income is vital to their families, but female workers need not be, because they are merely secondary workers seeking pin money whose income will not be missed. Stereotypical policies that apply only to women under the cover of pseudo-science indicate an attempt to discriminate against women, not an attempt to genuinely help the children of those workers. To insure genuine protection for all children, Johnson Controls' best option is to make the workplace safe for all workers, by adopting a policy that applies equally to men and women. Only that option accords with Senator Williams' statement during the floor debates on the PDA that "[n]o special restrictions applicable to pregnancy or childbirth alone will be permitted under this legislation." Senate Floor Debate, *Leg. Hist.* at 103.

It is possible, of course, that Johnson Controls' policy was motivated not by fetal health concerns but by cost considerations. The record below includes no evidence as to the cost of lowering workplace exposure to lead; there is merely a conclusory statement that no company has been able to make batteries without using lead. Cost, however, is not an excuse for discrimination. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1085 n.14 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978). In fact, the PDA was enacted despite projections that its cost would range from $130 million to $2.5 billion. S. Rep. at 11, *Leg. Hist.* at 48; Senate Floor Debate, *Leg. Hist.* at 98. As Senator Javits stated: "[a]s in all legislation designed to correct social injustices, this bill will entail some costs to employers and to the public . . . . [T]he costs entailed are quite insignificant in light of the principle that underlies this bill." Senate Floor Debate, *Leg. Hist.* at 68.

As yet another justification for its fetal protection policy, Johnson Controls claimed at the Seventh Circuit oral argument "that it is morally required to protect children from their parents' mistakes." *Johnson Controls*,

886 F.2d at 912 (Easterbrook, J., dissenting). However, the legislative history of the PDA shows that Congress intended to prohibit employers from using a morality rationale as justification for a policy of refusing to hire and promote female employees whose morality offended them. The Congressional intent to prevent employers from justifying hiring, firing, and no-promotion policies based on their aversion to the woman's moral decisions can be seen from how Congress handled the issue of abortion.

When the Senate first considered the abortion issue, it rejected an amendment by Senator Eagleton, which would have added the following sentence to the first section: "As used in this subsection, neither 'pregnancy' nor 'related medical conditions' may be construed to include abortions except where the life of the mother would be endangered if the fetus were carried to term." Senate Floor Debate, *Leg. Hist.* at 112. Those opposing the amendment emphasized, in urging its defeat, that it would allow employers to impose their moral beliefs on their employees. As Senator Javits explained, the Eagleton amendment

> leaves the employer in a position where, if any employee determines to have an abortion, that employer can take any adverse discriminatory action. He can refuse to hire, he can fire, he can demote, he can deny promotion, he can cut pay. In effect, therefore, *the conscience of the employer would be foisted upon the employee*, and I cannot conceive of our acquiescing in any such result.
>
> . . . .
>
> . . . [The amendment] would superimpose the right of the employer over the constitutionally protected individual conscience of the employee.

Senate Floor Debate, *Leg. Hist.* at 118-19 (emphasis added). The Senate then tabled the amendment. *Id.* at 120. It thus made very clear that an employer could not "foist" its moral beliefs on an employee through a policy of firing or refusing to hire women who had had abortions.

While the House bill did contain an abortion exception, it applied only to fringe benefits, not to hiring and firing policies. *Leg. Hist.* at 145. The Conference Committee narrowed the House's language even further, to an exception for health insurance benefits alone. House Conference Report, *Leg. Hist.* at 194. This left intact the original PDA provision barring employers from firing or from refusing to hire or promote women who had had abortions. Senator Javits explained: "since the abortion proviso specifically addresses only health insurance, the proviso in no way affects an employee's right to sick pay or disability benefits or, indeed, the freedom from discrimination based on abortion in hiring, firing, seniority, or any condition of employment other than medical insurance itself." Senate Floor Debate, *Leg. Hist.* at 203. Thus, under the PDA as enacted, employers may not refuse to hire or promote women who have had abortions. The policy of refusing to hire or promote women who are pregnant, or who may become so, out of a claimed moral concern for the health of their fetuses, fares no better. In neither case does the employer have a right to foist its conscience on the woman.

CONCLUSION

In conclusion, this Court should not disturb the policy decisions that Congress made in enacting the PDA—policies that are so clearly spelled out in the comprehensive legislative history that the Seventh Circuit simply ignored. Thus, for the reasons stated above, this Court should reverse the decision of the Seventh Circuit, grant summary judgment to the UAW, and rule that the Johnson Controls' policy of banning all fertile women from employment in the alleged interest of fetal health is a facial violation of Title VII, as amended by the PDA, that cannot be justified by a BFOQ.

Respectfully submitted,

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Thanks are extended to attorney Resa Goldstein, and Georgetown University Law Center students Chris Jacobson and Edwin Rodriguez for their help in preparing this brief.

APPENDIX

APPENDIX

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of Equal Rights Advocates, NOW Legal Defense and Education Fund, the National Women's Law Center, and the Women's Legal Defense Fund. These organizations were leaders in the Campaign to End Discrimination Against Pregnant Workers, the coalition which was the principal proponent of the Pregnancy Discrimination Act, and/or have represented women with claims of pregnancy-based discrimination. Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA. This brief amici curiae is filed in support of the Petitioners in this case.

Equal Rights Advocates, Inc. (ERA) is a San Francisco based public interest law firm dedicated to securing legal and economic equality for women through litigation, advocacy and public education. A major portion of ERA's work over the last sixteen years has been dedicated to the elimination of sex discrimination in the workplace. ERA was a member of the Campaign to End Discrimination Against Pregnant Workers, a broad-based coalition that worked to enact the PDA. ERA believes that employment discrimination based on pregnancy and a woman's reproductive capacity adversely affects large numbers of women workers and their right to equal employment opportunities.

The NOW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 250,000 women and men in more than 750 chapters throughout the country. A major goal of NOW LDEF is the elimination of barriers that deny women economic

opportunities. Discrimination against women based upon reproductive capacity, as a major barrier to women's full and equal employment, is a central concern to NOW LDEF.

The National Women's Law Center is a non-profit organization founded in 1972 as the Women's Rights Project of the Center for Law and Social Policy, and it became an independent organization in 1981. The Center first became actively involved in the issue of pregnancy discrimination in 1973, through its representation of amici curiae in support of the plaintiffs at the trial level in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Center continued its participation in this landmark case in the Court of Appeals and Supreme Court. Further, once *Gilbert* was decided, the Center became active first in developing and then participating in the Campaign to End Discrimination Against Pregnant Workers. In this capacity, the Center closely monitored the progress of the Pregnancy Discrimination Act, and provided technical assistance in support of its passage. Since that time, the Center has participated in numerous cases addressing problems of pregnancy discrimination, counseled victims of such discrimination, and served as a legal resource to combat pregnancy discrimination in many forums.

The Women's Legal Defense Fund (WLDF) is a non-profit, membership organization founded in 1971 to advance women's equality. WLDF combats gender-based discrimination in employment through litigation of significant cases, the operation of a counseling program, and agency advocacy before the EEOC and other agencies charged with enforcement of the equal opportunity laws. WLDF has had a particular interest in the issue of pregnancy-based employment discrimination because of its theoretical and practical centrality to equal employment opportunity for women. Thus, after this Court's decision in *General Electric Co. v. Gilbert*, *supra*, WLDF played a leading role in the coalition formed to enact the

Pregnancy Discrimination Act. After the PDA's enactment, WLDF advocated issuance of strong guidelines interpreting the PDA by the Equal Employment Opportunity Commission, and instituted a Pregnancy Rights Monitoring Project to educate the public about their rights under the PDA and to monitor government agencies' enforcement of that Act; WLDF continues this role to the present day. In 1979, WLDF began to advocate that the EEOC issue guidelines on the application of Title VII, as amended by the PDA, concerning employers' exclusion of fertile women based on alleged occupational reproductive health hazards, and founded a Coalition on the Reproductive Rights of Workers to promote public policy that ensures workplaces safe for all workers, including pregnant women. Again, WLDF has continued to comment on and monitor the development of EEOC policy regarding reproductive health hazards. WLDF has also participated as amicus in the two cases that have come before this Court on the proper interpretation of the PDA: *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). Finally, WLDF has led the efforts to secure passage of the federal Family and Medical Leave Act in Congress and of similar laws in the states.

The American Civil Liberties Union, which was also a major participant in the Campaign to End Discrimination Against Pregnant Workers, fully endorses this amici curiae brief, but is submitting a separate brief on behalf of itself and other amici.

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IN THE

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OCTOBER TERM, 1989

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Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICUS[1]

The Natural Resources Defense Council (NRDC), a nonprofit corporation whose principal place of business is at 122 East 42nd Street, New York, N.Y., has offices in Washington, D.C. and San Francisco, California, and a

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[1] All parties have consented to the submission of this brief. Written letters of consent will be on file with the Clerk.

membership of more than 125,000 persons across the United States and in several other nations. NRDC is dedicated to the perservation, enhancement and defense of the human environment and natural resources of the United States. In carrying out these objectives, NRDC has undertaken efforts to obtain clean air, clean water and toxic substances control, including activities to ensure effective implementation of health and environmental protection statutes. In connection with these activities, NRDC has on numerous occasions relied upon and supported governmental reliance upon laboratory animal studies to assess the risks that exposure to chemicals poses to humans.

SUMMARY OF ARGUMENT

The Court of Appeals erred in concluding that scientific data from experiments with laboratory animals are too speculative to support conclusions about the reproductive toxicity of chemicals in human males. Scientists routinely use laboratory animal testing to assess the risks that chemicals may pose to human beings. The regulatory agencies that Congress has charged with protecting humans from the harmful effects of chemicals in the environment have consistently adhered to the principle that laboratory animal studies are predictive of human health risks, absent clear proof to the contrary. The Court of Appeals was therefore wrong as a matter of scientific fact, as a matter of law, and as a matter of sound public policy in concluding that laboratory animal evidence of the reproductive toxicity of lead in human males was "speculative and unconvincing."

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT SCIENTIFIC DATA FROM EXPERIMENTS WITH LABORATORY ANIMALS ARE TOO SPECULATIVE TO SUPPORT CONCLUSIONS ABOUT THE REPRODUCTIVE TOXICITY OF CHEMICALS IN HUMAN MALES.

In upholding Respondent Johnson Controls' "business necessity" defense, both the District Court and the Court of Appeals rejected Petitioner International Union's argument that the risks to unborn children posed by worker exposure to lead in the workplace is not limited to females.[2] The International Union offered expert testimony to establish that male worker exposure to lead in the workplace also poses a substantial risk to unborn children. Although the International Union's experts did not attempt to prove conclusively that any particular human malformity had resulted from any particular father's exposure to lead in the workplace, they concluded *inter alia* on the basis of scientific studies conducted with laboratory animals that the exposure of human males to lead in the workplace posed a risk of genetic damage to their offspring. The Court of Appeals found, apparently as a matter of law, that this expert testimony would be inadequate, even if fully accepted by the factfinder, to support a conclusion that male worker exposure to lead

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[2] The Court of Appeals addressed the question of the usefulness of animal studies in evaluating reproductive risks in the context of the "business necessity" defense, which that court found applicable, despite the fact that the defendant's employment practices clearly constituted disparate treatment. If this Court accepts Petitioners' argument (and the position of Judge Easterbrook below) that in this case of disparate treatment the employer has the burden of proving that the employment practice constitutes a bona fide occupational qualification, then the court need not reach the question of the appropriateness of animal studies for assessing human risks.

posed substantial risks to unborn children. In relevant part, the Court of Appeals reasoned as follows:

> . . . [T]he UAW witnesses posited that animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure. The UAW witnesses attempt to bridge the wide chasm between the results of animal studies and a conclusion of genetic harm allegedly transmitted through the male human being with human studies merely establishing a correlation between male lead exposure and changes in sperm shape. It is interesting to note that the UAW has not presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure. It is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems.
>
> . . . Unlike the record evidence of a substantial risk of harm resulting to an unborn child from exposure to lead through the mother's blood stream and placenta, the evidence of risk to the unborn child resulting from exposure of the father to the lead levels currently present in Johnson Controls' battery manufacturing factories is, at best, speculative and unconvincing. The UAW's animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a nonspeculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead. . . .

International Union v. Johnson Controls, Inc., 886 F.2d 871, 889-90 (7th Cir. 1989). This statement is erroneous as a matter of law, as a matter of sound public policy, and as a matter of scientific analysis.

A. An Established Body of Scientific Opinion Supports the Use of Laboratory Animal Studies in Assessing the Reproductive Toxicity of Chemicals.

Scientists attempting to assess the toxicity of chemicals to human beings have a limited number of testing options. They can, of course, expose a group of human beings to various predetermined doses of the chemical being tested, observe the effects of the chemical on the exposed humans and their offspring, and compare the responses of the exposed humans to humans in a "control" group of unexposed, but otherwise equivalent humans. Obviously, when a chemical is suspected of producing toxic effects in humans or their offspring, this kind of controlled human testing raises grave moral questions. Past experiences with abuses of human experimentation have led federal agencies to restrict severely the conditions under which federally sponsored human experiments may take place in this country.[3] Even if human testing were ethically allowable, it would take several exposed groups containing thousands of individual humans to draw conclusions about the effects of low exposures (of the sort ordinarily encountered in the workplace) with any degree of statistical confidence. Obviously, such studies would be exceedingly burdensome and expensive.

In the absence of controlled human experiments, the next best source of scientific data on the human toxicity of chemicals is an epidemiological study in which a group of humans who have historically been exposed to greater than normal amounts of the chemical is isolated and compared to an equivalent "control" group. A whole host of methodological problems typically plague epidemiological studies of workplace chemicals. For example, it is often very difficult to determine the historical exposure levels of the workers in the exposed group. Poor medical rec-

[3] See 45 C.F.R. pt. 46 (1989) (Department of Health and Human Services Regulations on the Protection of Human Subjects).

ords also make it difficult to ascertain the incidence of particular diseases and to determine the cause of particular deaths. Selection and information biases can confound attempts to analyze the data objectively. Finally, because most epidemiological studies can examine only a limited number of subjects, only very strong effects can be confidently isolated.[4]

Because of the serious limitations that plague human testing and human epidemiological studies, scientists test chemicals in laboratory animals to discover their toxic effects. Although scientists generally agree that laboratory rodents are not identical in all regards to human beings, there is also general agreement that the results of laboratory animal toxicity testing are relevant to assessing the risks of human exposures to the tested substances. According to the widely-quoted Report of the National Academy of Sciences' Committee on the Institutional Means for Assessment of Risks to Public Health: "The inference that results from animal experiments are applicable to humans is fundamental to toxicological research; this premise underlies much experimental biology and medicine. . . ."[5] The Carcinogen Guidelines of the

[4] See United States Environmental Protection Agency, Proposed Guidelines for Assessing Male Reproductive Risk and Request for Comments, 53 Fed. Reg. 24850, 24861 (1988); United States Environmental Protection Agency, Proposed Amendments to the Guidelines for the Health Assessment of Suspect Developmental Toxicants; Request for Comments; Notice, 54 Fed. Reg. 9386, 9386-99 (1989). *See generally* National Academy of Sciences-National Research Council, Principles for Evaluating Chemicals in the Environment 126 (1975); National Academy of Sciences-National Research Council, Evaluating the Safety of Food Chemicals 44 (1970); Office of Science and Technology Policy, Chemical Carcinogens: A Review of the Science and its Associated Principles, 50 Fed. Reg. 10372, 10379-80 (1985).

[5] National Academy of Sciences-National Research Council, Risk Assessment in the Federal Government: Managing the Process 22 (1983).

Federal Office of Science and Technology Policy, which reflect the combined efforts of senior scientists from all of the major federal regulatory and research agencies, start with the proposition that

> it is reasonable to treat an animal carcinogen as if it were a human carcinogen. . . . This principle has been accepted by all health and regulatory agencies, and is widely regarded by scientists in industry and academia as a justifiable and necessary inference.[6]

These strong statements by panels of experts drawn from the most prestigious members of the scientific community contradict the sugestion in the affidavits of Johnson Controls' paid experts (untested by cross-examination or peer review) that the results of animal studies "were not scientifically established as being applicable to humans." *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 889 (7th Cir. 1989). The Court of Appeals erred in relying on the affidavits of the experts hired by Johnson Controls for the proposition that the International Union's "animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a nonspeculative conclusion. . . ." *Id.* at 889.

In particular, animal studies are relevant (indeed, often critical) to the assessment of the reproductive risks that chemicals in the workplace environment pose to human beings. Nisbet and Karch, for example, devote a chapter of their book "Chemical Hazards to Reproduction" to "Concordance Between Reported Effects in Humans and Measured Effects in Animals." The authors report that "[a] basic assumption in toxicology is that effects observed in experimental animals can be used to infer their likely effects (or lack of effects) in humans, with appropriate consideration of the biological differ-

[6] Office of Science and Technology Policy, *Chemical Carcinogens: A Review of the Science and its Associated Principles*, 50 Fed. Reg. 10372 (1985).

ences between species."[7] After examining the human and animal data for a selected group of chemicals suspected of causing reproductive effects, the authors conclude:

> Teratogenic effects in humans are matched by teratogenic effects in one or more species of experimental animal, and are also matched by the effects of similar risks in at least one species. . . . [T]here may be a fairly close concordance in the dose levels at which humans and animals respond to those agents, humans appearing somewhat more susceptible than the most sensitive animal species tested. In addition, . . . there may be similar concordance between humans and animals for other types of effects on reproduction, although in at least one case an animal species appeared to be much more sensitive than humans.[8]

A National Academy of Sciences expert panel began its discussion of the use of biologic markers in reproductive toxicology with the observation that "[e]xtrapolations to humans are to be based on the most sensitive animal species tested, barring clear evidence that the species is toxicologically distinct from humans."[9]

The Court of Appeals may also have misunderstood the reason that animal studies typically use one or more dose levels that are considerably higher than the level to which humans are exposed in the workplace. Testing animals at high doses is simply a matter of practical necessity. To detect effects that are significant in large exposed populations requires either testing at higher dose levels or testing an impractical number of animals. One National Academy of Sciences panel explained:

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[7] I. Nisbet & N. Karch, Chemical Hazards to Human Reproduction 93 (1983).

[8] *Id.* at 111.

[9] National Academy of Sciences-National Research Council, Biologic Markers in Reproductive Toxicology 3 (1989).

> The study of reproduction and development poses major resource and logistic problems for those working with laboratory animals. For instance, manageable sample populations do not reveal increases in toxic events of less than 5 to 10%. For some health effects associated with reproduction and neurodevelopment, such as mutagenesis and teratogenesis, incidences in a human population of 3 per 10,000 are significant. Obviously, these effects cannot be well defined in whole-body studies of thousands of experimental animals at a time. Classic toxicology studies of rodents involve the exposure and pathological analyses of 200 animals for 2 years. In such assays, each animal is a surrogate for 1,000,000 people. Birth defects undetectable in this rodent population could be epidemic within ten generations, if they occurred in humans.[10]

In this connection, it is important to note that Dr. Silbergeld (one of the plaintiffs' experts) testified emphatically in her deposition that "[t]here are no clear thresholds for any of these effects of lead." Silbergeld Deposition at 17. This testimony, which must be taken as true for purposes of a motion for summary judgment, indicates that high dose animal studies are relevant for assessing low dose human risks. It is therefore prudent to assume that, in the absence of a demonstrated threshold if lead causes adverse reproductive effects in laboratory animals at high doses, it will pose some risk of adverse effects in humans even at substantially lower exposure levels.

The Court of Appeals apparently failed to recognize that workplace chemicals such as lead can affect fetal development and the health of the subsequently born child in several ways.[11] After a fetus is in existence,

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[10] National Academy of Science-National Research Council, Biologic Markers in Reproductive Toxicology 4 (1989).

[11] This failure on the part of the Court of Appeals is understandable. Judges have no expertise in toxicology and should there-

it can be harmed by exposure to a chemical substance (transported across the placenta) in much the same way that an adult can be affected, although the fetus may be more susceptible to the chemical's toxic effects than a child or adult. The unborn child can also be damaged prior to conception when a chemical causes mutation in the genetic material of the sperm cell or the egg cell. Although such mutations may not affect the fetus in any significant way, they may well cause adverse effects that car severely affect the life of the human being *post partum*.[12] The first kind of adverse effect only occurs when a pregnant female is exposed to a toxic chemical. The second kind of effect can occur when either a male or a female is exposed. As a general matter, it cannot be said that one effect is more significant than the other, and for that reason it is impossible to conclude that exposure to a chemical that causes only the first kind of effect is riskier than exposure to a chemical that causes only the second kind of effect. Exposure to one chemical may present a high probability of a relatively modest consequence (e.g., slightly reduced I.Q.) while exposure to another chemical may pose a low probability of a disastrous consequence (e.g., hydrocephalus). In the absence of a great deal of information about the relative probabilities and without some very difficult judgments about the relative severity of disease end-points, it is impossible to conclude that one exposure poses a higher risk to the unborn human than the other.

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fore be cautious about drawing conclusions about the worthiness scientific data. This caution is especially warranted when the scientific information available to the court comes in the form of untested expert testimony in litigation affidavits.

[12] See generally Note, *Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?* 5 Colum. J. Env. L. 97, 99-100 (1978). Dr. Legator's desposition testimony, which must be accepted as true for purposes of a motion for summary judgment, was that "lead is one of the very few chemicals . . . that probably causes a genetic lesion during spermatogenesis." Legator Deposition at 20.

The real world is more complex than the above example suggests. Exposure to a single substance may pose a risk of both kinds of adverse effects. Preconception exposure of either the male or female may pose a small probability of mutation leading to a grotesque malformity, while post-conception exposure of the female may lead to more modest health effects. Thus, the International Union's claim with respect to lead exposure in the workplace is not at all fanciful. The post-conception scenario is relatively well-understood. Scientists know that lead passes from the mother's blood to the fetus at some time during pregnancy. Scientists also know that elevated lead levels in children are associated with various diseases ranging in severity from relatively minor adverse effects at low blood levels to more severe effects at high blood levels. The knowledge-base for these relatively strong scientific conclusions consists of human epidemiological studies, a large number of animal studies and occasional clinical observations.

It is much more difficult to explore preconception toxicity with epidemiological studies. Proper epidemiology would require knowledge about both the mother's and father's exposures and about all pregnancy outcomes, even though some mutations result in spontaneous abortions. This information is much harder to acquire. Scientists, regulatory agencies and courts are therefore forced to rely more heavily upon laboratory animal studies as the knowledge-base from which to draw conclusions about the effects of preconception exposure to chemical substances. Reliance on animal studies is concededly more "speculative," but it was wrong for the court to conclude that animal studies are not "convincing" or "solid" scientific data. When existing epidemiological studies do not provide adequate information on human exposures to the substance at issue, it is not at all "unscientific" or "unreasonable" to draw conclusions about human risks from existing animal studies.

B. Courts and Administrative Agencies Have Consistently Relied Upon Laboratory Animal Studies in Assessing the Risks of Chemicals to Humans.

From the beginning of this century, Congress has enacted precatory statutes designed to protect the public health from the toxic effects of chemicals in food, the workplace and the general enivornment. The regulatory agencies that Congress created to implement these statutes have, with the approval and often active encouragement of the reviewing courts, consistently relied upon laboratory animal studies in evaluating human risks. In the last two decades, governmental reliance on laboratory animal studies has become thoroughly interwoven into the regulatory fabric of our society.

A partial list of federal laws in which animal studies are routinely used to assess human health risks includes: the Federal Insecticide, Fungicide and Rodenticide Act;[13] the Federal Food, Drug and Cosmetic Act;[14] the Consumer Product Safety Act;[15] the Safe Drinking Water Act;[16]

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[13] 7 U.S.C. § 136-137y; EPA routinely relies upon animal data in reaching pesticides regulatory decisions, see, e.g., 40 C.F.R. Part 154.7(a)(2)(i) ("validated test data" used for cancellation decisions, due to carcinogenicity, teratogenicity or reproductive toxicity from "effects demonstrated in humans or experimental animals").

[14] 21 U.S.C. § 348(c)(3)(A) ("no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal.")

[15] 15 U.S.C. § 2079(a) and the Federal Hazardous Substances Act § 2(f)(1)(A), 15 U.S.C. § 1261, 1262. See e.g., 16 C.F.R. § 1500.17 (a)(10), and 43 Fed. Reg. 12308-12310 (animal studies are the basis for classification as banned hazardous substance of self-pressurized household substances containing vinyl chloride monomer).

[16] 42 U.S.C. §§ 300(f) *et seq.* See, e.g., 44 Fed. Reg. 68624, National Interim Primary Drinking Water Regulations; Control of Trihalomethanes in Drinking Water:

> . . . sufficient scientific evidence had been accumulated to conclude that chloroform is an animal carcinogen as shown from a properly conducted bioassay and should be presumed to be a risk to humans and that, as such, prudent public health policy warrants reasonable measures to reduce human exposure. . . . In the specific case of chloroform and other THMs, EPA had relied primarily on animal studies demonstrating the toxicology of chloroform. . . . EPA has extrapolated from the results of animal studies to assess the risk posed by THMs to humans.

Id. at 68627.

the Toxic Substances Control Act;[17] the Federal Water Pollution Control Act;[18] the Federal Clean Air Act;[19] the

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[17] 15 U.S.C. §§ 2601-2629 (1976). § 2603(b)(2)(A) provides:

> The health and evironmental effects for which standards for the development of test data may be prescribed include carcinogenesis, mutagenesis, teratogenesis, behavioral disorders, cumulative or synergistic effects, and any other effect which may present an unreasonable risk of injury to health or the environment. . . . The methodologies that may be prescribed in such standards include epidemiologic studies, serial or hierarchical test, in vitro test, and *whole animal tests*, ...

(Emphasis supplied); see also 40 C.F.R. Part 798 which specifies the use of numerous animal test procedures to determine chemical oncogenicity (§§ 798.3300, 798.320) and reproductive toxicity (§§ 798.5100-798.5955) for purposes of implementing § 4 of the Act.

[18] FWPCA § 307(a), 33 U.S.C. § 1317(a) (1976). See, e.g., 41 Fed. Reg. 30476-77 (1976) and 42 Fed. Reg. 6532 (1977) (proposed and final discarges standards for PCBs based on evidence of animal carcinogenicity).

[19] 42 U.S.C. § 7412. See, e.g. National Emission Standards for Hazardous Air Pollutants: Proposed Standard for Vinyl Chloride, 40 Fed. Reg. 69532 (December 24, 1975). (The rationale for the standard included animal test data demonstrating carcinogenicity of vinyl chloride as well as epidemiological studies.) See also, Nation Emission Standard for Vinyl Chloride, 40 C.F.R. Part 61, Subpart F.

Occupational Safety and Health Act;[20] and the Resource Conservation and Recovery Act.[21]

Under these statutes, the federal courts have uniformly recognized the need to regulate carcinogens and reproductive toxins on the basis of animal test results in the absence of definitive human epidemiological data. The plurality opinion of this Court in the *Benzene* case recognized the practical necessity of basing public policy decisions affecting public health on laboratory animal studies. The opinion observed that several "rational" techniques existed for determining whether human exposure to a toxic substance in the workplace presented a "significant risk" of material health impairment and noted that "[i]n other proceedings, the Agency has had a good deal of data from animal experiments on which it could base a conclusion on the significance of the risk." *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 657 n.64 (1980). If, as the Court of Appeals in this case maintained, evidence from animal studies is in fact "speculative" and "unconvincing," it would have been disingenuous for this Court to have suggested that

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[20] 29 U.S.C. § 655. See OSHA Cancer Policy which "establishes the criteria and procedures under which substances will be regulated by OSHA as potential occupational carcinogens." 29 C.F.R. § 1990.111(a). Positive results in high-dosage animal tests "will be used to establish the qualitative inference of carcinogenic hazard to workers." 29 C.F.R. § 1990.143(g). See, e.g., 39 Fed. Reg. 35890, 35891 (1974), 38 Fed. Reg. 10929 (1973) (OSHA exposure standards for vinyl chloride and ethyleneimine, respectively, based on animal studies indicative of carcinogenicity).

[21] 42 U.S.C. § 6901 *et seq.* See 42 U.S.C. § 6421 and implementing regulations at 40 C.F.R. 261.11(a):

> The Administrator shall list a solid waste as a hazardous waste [if] . . . (3) it contains any of the toxic constituents listed in Appendix VIII . . . Substances will be listed in Appendix VIII only if they have been shown in scientific studies to have toxic, carcinogenic, mutagenic or teratogenic effects on humans *or other life forms.*

(Emphasis supplied).

OSHA could meet the Court's "significant risk" test by relying solely upon such evidence.

The United States Court of Appeals for the District of Columbia has observed that the government

> has a 'heavy burden' to 'explain the basis for . . . [a] decision to permit the continued use of a chemical known to produce cancer in experimental animals.' [citations omitted]. When firm evidence establishes that a chemical is a carcinogen, statutes leave an administrator no alternative but to step in and protect the public.'

Environmental Defense Fund, Inc. v. EPA, 598 F.2d 62, 88 (D.C. Cir. 1978). See also *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975) (upholding the ban of the pesticides aldrin and dieldrin based upon carcinogenicity in rats and mice); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 (D.C. Cir. 1971) (DDT); *EDF v. Costle*, 578 F.2d 337, 345 (D.C. Cir. 1978) (court remanded to EPA regulations implementing the Safe Water Drinking Act that failed adequately to protect the public upon "ample evidence . . . our drinking water is contaminated with a large variety of organic substances, of demonstrated carcinogenicity in animals"); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1005-06 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977) (heptachlor and chlordane) (court approved EPA's use of "cancer principles" that "accept the use of animal test data to evaluate human cancer risks; [and] consider a positive carcinogenic effect in test animals as sufficient to characterize a pesticide as posing a cancer risk to man . . ."); *Hercules Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978) (EPA regulation of toxaphene and endrin under section 307 of the Clean Water Act, 33 U.S.C. § 1317); *Society of Plastics Industry v. OSHA*, 509 F.2d 1301 (D.C. Cir. 1975) (OSHA regulation of vinyl chloride); *Synthetic Organic Chem. Mfrs. Assn. v. Brennan*, 503 F.2d 1155 (3rd Cir. 1974)

(court upheld OSHA's workplace exposure standard for ethyleneimine, upon its demonstrated carcinogenicity in mice and rats, noting "the extrapolation gathered from data in these rodent experiments to humans is justified by the report of the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens to the Surgeon General"); *Bell v. Goddard*, 366 F.2d 177, 180-81 (7th Cir. 1966) (court affirmed an FDA ban on diethelstilbestrol (DES) as a poultry feed supplement on evidence of its carcinogenicity in test animals, noting "there is a histologically remarkable similarity between cancers of the endometrium in humans and animals").

Judge Easterbrook, in his dissenting opinion in the Court of Appeals below, speculated that "[t]he medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too 'speculative.'" 886 F.2d at 919. Judge Easterbrook was right. Not only have the medical profession and the Food and Drug Administration consistently relied upon animal studies to assess human health risks, but virtually every other federal agency charged with protecting the public health from hazardous chemicals has also extrapolated from "mouse-to-man" in evaluating human health risks. Indeed, it would be irresponsible for an agency charged with protecting health to do otherwise.[22]

[22] In his deposition testimony Dr. Legator gave an example of an instance in which the Environmental Protection Agency's failure to act on the basis of animal studies on the pesticide DBCP resulted in sterility in workers exposed to that substance:

> With DBCP we had substantial information about the fact that this chemical at five parts per million caused testicular atrophy in a variety of animals. The study was generated in 1963. And basically we ignored the animal data, until the workers found an effect themselves in 1977.

Legator Deposition at 52. Upon discovering the human consequence, EPA cancelled the registration of DBCP. 50 Fed. Reg. 1122 (1985). OSHA promulated a standard to protect workers from DBCP in 1978. 43 Fed. Reg. 11514 (1978).

In promulgating its standard for workplace exposure to lead, the Occupational Safety and Health Administration concluded:

> The record in this rulemaking is clear that male workers may be adversely affected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. . . .[23]

In forming this conclusion, the agency relied heavily upon the very animal studies that the Court of Appeals in this case summarily rejected on the basis of a summary judgment record devoid of cross-examination, peer review or any other validating technique.

The United States Environmental Protection Agency in 1988 proposed guidelines for assessing male and female reproductive risks[24] and for assessing the risks of suspected developmental toxicants.[25] Both sets of guidelines rely heavily upon data from animal experiments in evaluating human risks. Under the "weight of the evidence" approach that the guidelines adopt for characterizing male reproductive risks due to chemical exposures, the guidelines posit that a "known positive" reproductive effect exists when "[a] convincing body of evidence exists that an agent causes an adverse effect on the male reproductive system in humans." A "probable positive" effect exists when "[a] convincing body of evidence exists that

[23] Occupational Safety and Health Administration, Final Standard for Occupational Exposure to Lead, 43 Fed. Reg. 52952, 52966 (1978).

[24] Environmental Protection Agency, Proposed Guidelines for Assessing Female Reproductive Risk, 53 Fed. Reg. 24834 (1988); Environmental Protection Agency, Proposed Guidelines for Assessing Male Reproductive Risk, 53 Fed. Reg. 24850 (1988).

[25] Environmental Protection Agency, Proposed Amendments to the Guidelines for the Health Assessment of Suspect Developmental Toxicants, 54 Fed. Reg. 9386 (1989).

an agent causes an adverse effect on the male reproductive system in nonhuman mammals." 53 Fed. Reg. at 24863. While it is clear that human testing and epidemiological studies are the strongest evidence of male reproductive effects, the EPA has concluded that animal studies alone are not "specuiative" or "unconvincing" evidence of human reproductive effects.

The Guidelines for Developmental Toxicity address, *inter alia*, the risks that pre- and post-conception exposures pose to unborn humans.[26] One of the fundamental assumptions underlying the guidelines is that

> an agent that produces an adverse developmental effect in experimental animal studies is assumed to pose a potential hazard to humans following exposure during development. This assumption is based on the data for known human developmental toxicants. In almost all cases, the experimental animal data would have predicted a developmental effect in humans.

54 Fed. Reg. at 9390. The guidelines provide that 'adequate evidence of potential human developmental toxicity exists where there is 'data from an appropriate, well-executed study in a single experimental animal species that demonstrates developmental toxicity. . . .'" 54 Fed. Reg. at 9399. It goes without saying that "adequate" evidence is not "speculative" or "unconvincing."

Clearly, the Court of Appeals' conclusion that laboratory animal data do not constitute "convincing scientific data" does not comport with the scientific judgment of

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[26] The guidelines define "developmental toxicology" as "[t]he study of adverse effects on the developing organism that may result from exposure prior to conception (either parent), during prenatal development, or postnatally to the time of sexual maturation. . . . The major manifestations of developmental toxicity include: "(1) death of the developing organism, (2) structural abnormality, (3) altered growth and (4) functional deficiency." 54 Fed. Reg. at 9390-91.

the agency that Congress has charged with regulating environmental risks to human reproduction.

The Equal Employment Opportunity Commission issued policy guidance to its investigators in the wake of the Court of Appeals' decisions in this case that spoke directly to the use of laboratory animal data to assess human risks in both sexes:

> The majority in *Johnson Controls* rejected UAW's animal research evidence, stating that it was "speculative," "unconvincing" and not "solid scientific data." . . . Commission investigators should not reject animal studies in such a wholesale manner. . . . These studies may in some cases provide the best available evidence to evaluate fetal or other human health hazards in the workplace. Certainly, the data from the animal research in this case, along with the other data provided, should have been sufficient to create a genuine issue of material fact warranting denial of summary judgment.[27]

The Commission was clearly correct in telling its investigators not to fall into the trap that ensnared a majority of Court of Appeals in this case.

The Commission correctly pointed out in its policy guidance that the question of the extent to which human health risk assessment should rely upon animal toxicity data was more properly the domain of the public health agencies like the Environmental Protection Agency and the Occupational Safety and Health Administration.[28]

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[27] Equal Employment Opportunity Commission, Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.*, reprinted at p. 127a of the Appendix to the Petition for Certiorari.

[28] The Policy Guidance states:

> In determining whether the harm is mediated only through one sex, animal research should be considered along with other objective scientific evidence. The Commission will defer to pertinent findings by government agencies such as OSHA and

The reviewing courts, including this Court, should heed this sage advice. Court are not well qualified, either technically or institutionally, to engage in wholesale science policy judgments of the sort that the Court of Appeals in this case mandated. As we have seen, virtually every federal agency that is charged with implementing public health laws routinely relies upon animal testing data in assessing human health risks. This Court should defer to that expert judgment.

CONCLUSION

The International Union in this case contends that Johnson Controls has the burden of proving that its disparate treatment of women reflects a "bona fide occupational qualification." If this Court accepts this view of the law, then there is no need to address the use of animal studies in evaluating human reproductive risks. To meet the "business necessity" test adopted by the Court of Appeals in this case, however, the International Union offered evidence from laboratory animal studies tending to prove that lead exposure to male humans at levels comparable to those found in the Johnson Controls plant posed a significant risk of adverse effect to unborn children through mutations of the genetic material in sperm cells. The International Union was not allowed to introduce this evidence in its legitimate attempt to persuade the factfinder that the overall risk posed by male exposure is roughly comparable (if not higher) than the risk posed by female exposure through transplacental passage of lead into the blood stream of existing fetuses. In finding that the evidence from animal testing was "speculative" and "unconvincing," the Court of Appeals departed from a long-accepted and well-established practice of scientists,

NIOSH [the National Institute for Occupational Safety and Health].

Appendix to the Petition for Certiorari at 127a.

regulatory agencies and reviewing courts of using animal studies to evaluate human health risks.

Respectfully submitted,

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OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

—v.—

JOHNSON CONTROLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS BY AMERICAN CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION-WISCONSIN; AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN FRIENDS SERVICE COMMITTEE; ASIAN IMMIGRANT WOMEN ADVOCATES; BOSTON WOMEN'S HEALTH BOOK COLLECTIVE; CENTER FOR CONSTITUTIONAL RIGHTS; CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH; COAL EMPLOYMENT PROJECT; COALITION OF LABOR UNION WOMEN;

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10 JANE DOES and 2 JOHN DOES).

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted pursuant to Rule 37.3 of the Rules of this Court and is filed in support of Petitioners.1/

Amici are organizations and individuals concerned about the pervasive policies of employers such as Johnson Controls. Such policies assume that fertile women are always potentially pregnant, require women to be sterilized to qualify for employment, and deny fertile women important job opportunities, all in the name of fetal health. Amici are knowledgeable about the nature and extent of such policies and the respects in which they actually undermine the health of women, children and men. Some amici join

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1/ Letters of consent of the parties are being filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

this brief to describe how policies like the one at issue here have affected them and their families.2/

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended ("Title VII") was intended to eradicate employment discrimination based on sex, including pregnancy. 42 U.S.C. §2000e(k). Congress' actions were based, in large part, on a recognition that unemployment and occupational segregation have serious consequences for women and families, especially children. As a result, Congress intended to strike at the "full range" of such practices. (Point I)

2/ Attached as an appendix to this brief are statements of interest for the amici. Some of the individual amici have requested anonymity to protect their privacy and because they fear reprisal by their employers. They are identified as Jane Does 1-10 and John Does 1 and 2.

The facts upon which Congress relied remain true today. Specifically, Congress recognized that women's employment is critical to the welfare of families (Point IA) that serious health consequences are associated with denial of employment opportunities (Point IB), and that stereotypes about women limit those opportunities. (Point IC) Congress concluded that it was essential to make the right to work compatible with the right to have a family. (Point ID)

Congress thus expressed the commitment to full employment rights in unequivocal language. (Point IIA). The limited exception to the statutory mandate does not apply here. In particular, costs of employing women or improving working conditions do not justify a policy that excludes women from employment

opportunities. (Point IIB) The lower courts that have attempted to craft new approaches to the statute's requirement have impermissibly distorted the statutory scheme. (Point IIC) Enforcement of Title VII will return occupational health and safety determinations to federal regulatory authorities, whose efforts to improve workplace conditions have been undermined by the opinion of the court below.

ARGUMENT

Introduction

This case presents the question of whether Title VII prohibits an employment practice that restricts opportunities for women who are willing and able to work because of the chance that they may become pregnant and that a workplace hazard may harm the fetus. Judge Easterbrook, dissenting in the court below, considered

it "likely the most important sex discrimination case in any court since...Congress enacted Title VII" and predicted that the decision, unless reversed, could limit women's access to as many as "20 million industrial jobs." International Union, UAW v. Johnson Controls, Appendix to the Petition For Certiorari (hereinafter "Pet. App.") at 99a and 100a.

This is no exaggeration. In a variety of forms, these policies are already pervasive; they are most pronounced in industries historically closed to women, where high wages and good benefits make jobs particularly attractive to unskilled workers with few other options.3/ For many

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3/ See, Paul, et al., Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am. J. Occ. Med. 267 (1989) reporting a higher incidence of (continued...)

women and men, such employment offers the only alternative to poverty.

The court of appeals' characterization that women take these jobs "to better the family's station in life," Pet. App. at 51a, understates the significance of this kind of employment to the well-being of women and their families. The stories of women and men affected by these discriminatory policies offer an insight into the reality of life outside the courtroom walls and graphically illustrate the profound personal and economic effects of policies requiring women to choose between their jobs and their fertility.

3/ (...continued)
discriminatory policies in male intensive industries. See generally, Committee on Education and Labor, A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, 101st Cong., 2d Sess. (Comm. Print 1990) (hereinafter "House Committee Report").

Most of these women are deeply concerned about the health and well-being of their families. These are not women who "might somehow rationally discount" the risks of work and selfishly sacrifice the health of their children for mere "financial reward." Pet. App. at 51a and 21a. They work because they must, at the best jobs they can get.

> [When] I began working in the foundry of an automobile plant. . . I had one small child and when my husband and I separated, I needed to find a job with good salary and benefits. The plant was the only place in the area that offered both. . . . If I lost my job I would never find anything comparable to what I now have. A woman who is in her late thirties as I am would probably only be able to get a job as a sales clerk in the shopping mall or as a waitress in a fast food restaurant. (A-71-72)4/

* * *

4/ References are to Appendix pages at which individual Statements of Interest are set forth.

[After] I quit school in the 10th grade. . . I worked for five years as a sales clerk. . . [at] minimum wage. . . . [When] I heard that they were hiring women at [the] plant I applied for the job because it offered a much better salary and better benefits. . . A-65-66

* * *

I am the major supporter of my family. My husband is presently laid off from his job. My family depends on my salary and benefits, and it would be disastrous for us if I lost my job before my husband is called back to work. A-74

Their counterparts are men who are plagued by concerns about the effects of workplace hazards on themselves and their future children.

> In 1978 or 1979 [my brother] was tested and had a very high blood lead level. In 1980 or 1981 he collapsed on the job melting ore (iron) in the melting area. . . . [He] was forty four years old when he had the heart attack, and . . . I strongly believe [it] may very well have been caused by the many years he spent working in the high lead melting area and nearby areas. A-46

* * *

> I have worked in the automotive industry for twenty-five years . . . . Only three of my five children are alive. . . . I am convinced that my exposure to hazardous substances in the workplace was the cause of the two deaths and possibly the premature birth of [my] twins. . . . A-63

Both men and women have little information and fewer choices.

> You might say that we're sort of caught between a rock and a hard place. Some men prefer to ignore the health issue and just gamble that they or their children won't get sick. A-65

* * *

> I decided to have the sterilization because I needed to keep my job. . . . I knew that my husband and I were going to separate, and that I would have to support myself and my son. In addition, I had always helped my parents who were elderly and infirm. . . . I was 26 years old when I was sterilized. A-52-53

Johnson Controls has elected to disregard the risks of lead to male workers and to "protect" women by denying them jobs instead of improving workplace

conditions.[5] In validating this approach, the decision below is inconsistent with the conclusions of federal health authorities that men and women require an equivalent degree of workplace protection to safeguard their own health and that of future generations. It also conflicts with regulations adopted pursuant to the Occupational Safety and Health Act, 29 U.S.C. §651, et seq. ("OSH Act") that require employers to protect both men and women planning families at the level of

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5/ Johnson Controls' assertion that hazardous conditions cannot be improved is palpably untrue, as federal regulators and public health experts have found. See Brief amici curiae of the American Public Health Ass'n, et al. ("APHA Brief"). If Johnson Controls could not comply with occupational health standards, it would be required to apply to the Secretary of Labor for a variance. 29 U.S.C. §655(6)(A). See also General Electric Co. v. Secretary of Labor, 576 F.2d 558 (3d Cir. 1978).

exposure at which Johnson Controls excludes women.[6]

The lower court assumed that women will make inappropriate decisions about work and childbearing; it would defer to "an employer [who] adopts an employment policy designed to address a difficult societal problem," Pet. App. at 49a, even though that policy offers neither workplace safety for men nor equity for women. The court thus ignored not only the Congressional mandate expressed in OSHA, but also the conclusions Congress reached in enacting and amending Title VII, that unemployment and underemployment pose serious risks for women and their families, and that women

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6/ Final Standard for Occupational Exposure to Lead, 29 C.F.R. §1910.1025 (1989). OSHA's Lead Standard and subsequent regulatory actions regarding lead are discussed extensively in the APHA Brief.

cannot be forced to forego childbearing in order to work.

I. The Objectives Congress Sought To Achieve When It Adopted And Amended Title VII Are Directly Threatened By Policies Such As Johnson Controls'

Title VII prohibits intentional sex discrimination in employment unless sex is a bona fide occupational qualification ("BFOQ"). 42 U.S.C. §2000e-2(e)(1). Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). Cf. Price Waterhouse v. Hopkins, __U.S. __, 109 S.Ct. 1775 (1989) (mixed motive case). In response to Gilbert v. General Electric, 429 U.S. 677 (1976), holding that pregnancy-based discrimination was not per se gender-based discrimination within the meaning of Title VII, Congress enacted the Pregnancy Discrimination Act ("PDA") "to make plain that, under Title VII. . . discrimination

based on pregnancy, childbirth and related medical conditions is discrimination based on sex. Thus, the bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women[.]"[7] The PDA further "illustrate[s] how discrimination against pregnancy is to be remedied."[8] Women, whether or not pregnant, are entitled to employment opportunities based solely on the "ability or inability to work." 42 U.S.C. §2000e(k).

Because women are as capable of producing batteries as men are, the plain

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7/ Comm. on Labor and Human Resources, Legislative History of the Pregnancy Discrimination Act of 1978, 96th Cong., 2d Sess. 40-41 (Comm. Print. 1979) (hereinafter "Legis. Hist.") (emphasis supplied).

8/ California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 285 (1987). (hereinafter "Cal Fed")

language of Title VII, as amended by the PDA, clearly prohibits Johnson Controls' policy, regardless of whether that policy is construed as discriminating against all women or potentially pregnant women.9/ As the extensive legislative record underlying the PDA reveals, Title VII was intended to redress "the full range of discriminatory practices which have adversely affected [women's] status in the work force."10/

In particular, Congress recognized that women's employment is critical to the welfare of women and families, that denial of access to employment opportunities

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9/ The court below concluded that the policy did not apply to all women, but affected only those capable of bearing children. E.g., Pet. App. at 43a. The terms of the policy, however, draw explicit gender based lines. All women (but no men), for example are required to submit medical evidence of sterility as a condition of employment.

10/ Legis. Hist., supra note 7 at 63. (emphasis supplied).

results in a lower standard of living with devastating consequences, and that sex-based stereotypes limit women's employment opportunities. In consideration of both the equity of women's claim to equal employment opportunity and the practical necessity of work for many women, Congress expressly endorsed the proposition that no woman should have to sacrifice the right to work in order to have a family, nor sacrifice the right to have a family in order to work.

As demonstrated below, policies like Johnson Controls' directly threaten the principal goals to be achieved by Title VII's prohibitions on sex discrimination. A construction of the statute permitting such policies would frustrate its very purposes.

A. Women's Employment Is Critical To The Welfare Of The Family.

Policies that deny women employment reflect an assumption that women can forego employment without serious consequences, but the facts are otherwise. In both single parent and dual wage earner households, women's employment is critical to the maintenance of many families, and the loss or reduction of a woman's income will have devastating effects, as Congress acknowledged:

> In many low-income families the financial support provided by the mother has become essential for the families' economic survival. . . . In an increasing number of middle-income families the support and the well being of the family has become inextricably tied to the income generated by females.[11/]

11/ Legis. Hist., supra note 7 at 127.

In dual wage earner families, full-time working wives contribute an average of 37.6% of the family income, and the poorer the family, the more critical the wife's contribution. In families in which the total income is less than $15,000, that contribution averages more than half.[12/] In 1984, for example, poverty was 35% lower than it would have been had wives not worked.[13/]

12/ Supporting A Family: Providing the Basics: Hearing Before the House Comm. on Children, Youth, and Families, 98th Cong. 1st Sess., 39-40 (1983)(Statement of Diana Pearce)(hereinafter "Supporting A Family"). Among black couples, the median family income of those families with a wife in the paid labor force was nearly double that of families where the wife did not go out to work, and among Hispanics, it was nearly 75% higher. Appendix, "Median Annual Income of Families by Family Type, Race and Hispanic Origin, 1987," in The American Woman 1990-91, A Status Report 362 (S. Rix, ed. 1990).

13/ Work in America: Implications for Families: Hearing Before the House Select Comm. on Children, Youth, And Families, 99th Cong., 2d Sess. 4 (1986)(Opening Statement of George Miller) (hereinafter "Work in America").

A significant number of women are primary or sole wage earners. Approximately 45% of women in the labor force are single, separated, divorced or widowed.14/ Many of these women have families and many are poor.15/ Another 15% of women in the labor force are married to men earning less than $15,000 a year.16/

14/ Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, Fact Sheet No. 88-2, Facts on Women Workers, ¶9 (1988)(hereinafter "Facts on Women Workers").

15/ Nearly half of all female headed households (including both working and non-working mothers) were in poverty in 1987, and most of these were households with children. U.S. Children and Their Families: Current Conditions and Recent Trends, 1989, H.R. Rep. No. 356, 101st Cong., 1st Sess. 110-11 (1989)(hereinafter "Children and their Families"). Female headed households represent an increasing share of all families in poverty (51.4% in 1986 as compared to 45.7% in 1982). Children and Families in Poverty: The Struggle to Survive: Hearing Before the House Select Comm. on Children, Youth, and Families, 100th Cong., 2d Sess. 11 (1988).

16/ Facts on Women Workers, supra note 14 at ¶19.

In recognition of the fact that women were in the workforce because of "pressing economic need" and required "protection for their financial security and the security of their families",17/ Congress was particularly concerned about practices that restricted women's access to lucrative and desirable employment and froze them in the status of marginal workers. Statistics on the extent of wage disparity due to occupational segregation reflect the pervasiveness of such practices and Congress found them "shocking".18/ The data reveal that the problem is particularly acute for unskilled women who are concentrated in low-paying, female

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17/ Legis. Hist., supra note 7 at 61.

18/ Id.

intensive industries[19/] and minimum wage jobs.[20/]

Access to non-traditional jobs is therefore especially important to unskilled women if they are to escape from poverty and attain economic security for themselves and their families. Title VII and other civil rights measures brought these women

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19/ There is a clear inverse correlation between wages and the proportion of female employees in jobs. Work in America, supra note 13 at 29, Table 4 (Statement of Janet Norwood). In 1981, the expected median wage in occupations filled exclusively by women was less than half that of the median in exclusively male occupations. National Academy of Sciences, National Research Council, Women's Work, Men's Work, Sex Segregation on the Job (B. Reskin, H. Hartmann, eds.) 1, 10 (1986).

20/ Smith, "The Paradox of Women's Poverty: Wage Earning Women and Economic Transformation," Women and Poverty 122, 137 (C. Gelpi, et al., eds., 1986). Minimum wage now equals only about three-quarters of federal poverty guidelines for a family of three. Children's Defense Fund, "The Unmaking of Decent Family Income" in A Vision for America's Future 18 (1989) (hereinafter "Vision for America's Future").

the promise of such employment,[21/] but policies like Johnson Controls' would close the workplace doors once again. Indeed, sex-based policies take their most extreme and oppressive form in occupations characterized by high wages, good benefits, and entrenched gender-based segregation.[22/] Johnson Controls' policy, effectively excluding women from all employment in its battery plants, is typical of restrictions in male dominated industries.[23/] Thus,

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21/ See, e.g., Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L.Rev. 1219, 1239 (1986).

22/ Id. See note 3, supra.

23/ For example, the policy adopted by the Olin Corporation in 1978 excluded fertile women from five of eleven lines of progression in one division and some jobs elsewhere. Wright v. Olin, 697 F.2d 1172, 1182 (4th Cir. 1982). General Motors' "fetal protection" policy "virtually forecloses the employment of women altogether" at its battery plants. Scott, "Keeping Women in Their Place," in Double Exposure 180, 181 (Chavkin, ed. 1984). And see Grant v. General Motors, appeal

(continued...)

women are now subject to exclusion from the very jobs and occupations that Congress specifically identified as critical to their economic well being and that of their families.

Gender-based policies are less extreme and less common in other occupations, but occur there too, with the effect of denying women employment security and continuity of wages.[24] These examples reveal that if a

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[23] (...continued)
filed (6th Cir. No. 89-3478). Rules barring fertile women from various jobs have reportedly been adopted by Monsanto, B.F. Goodrich, Union Carbide, American Cyanamid, St. Joe's Minerals Bunker Hill Smelter, Gulf Oil and others. Becker, supra note 21 at 1226-27; House Committee Report, supra note 3 at 6.

[24] For example, both Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) and Zuniga v. Kleberg County Hospital, 692 F.2d 986 (5th Cir. 1982) involved x-ray technicians who were fired when they became pregnant even though both were well within universally accepted safety limits for pregnant women. AT&T has barred pregnant women from jobs at computer chip processing plants because of unconfirmed reports of reproductive

(continued...)

woman's employment can be limited because she could become pregnant and her employer perceives some risk, the reach of such

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[24] (...continued)
health hazards. Bureau of National Affairs. Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave and Health and Safety 66 (1987).

policies is virtually unlimited.25/ Judge Easterbrook commented:

> A female bus or taxi driver is exposed to noxious fumes and the risks of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can refuse to hire women? That an employer could forbid pregnant employees to drive cars because of the risks accidents pose to fetuses? For all we can tell, Johnson's argument compels us to answer "yes" to these questions.

Pet. App. at 92a.

Congressional disapproval of all these results - denial of employment, mandatory pregnancy leave, or other limitations - could not be clearer:

> In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant. . . . A common practice has been to place women on mandatory unpaid leave, regardless of their ability or inability to work. In some cases, women discriminated against are permitted to return to their former employment after delivery; but in other cases mandatory leave results in loss of previous position, lower pay and loss of employment security. In the extreme case, women who have become pregnant are simply terminated by their employers.26/

25/ Employers do, in fact, exclude women from work based on their own assessment of risk and in the face of medical opinion to the contrary.

> [When] my supervisor learned that I was pregnant, she told me I would have to stop working.... [E]ven with my doctor's authorization, I was laid off. . . . These last six months have been hard for us. . . . [W]e cannot make ends meet every month. A-68-69.

* * *

> [W]hen the personnel director learned that I was pregnant, I was told that I couldn't stay on the job. I wasn't given any reason, and even my doctor said that I could continue working. The personnel director informed me that if I had wanted to keep my job then I shouldn't have gotten pregnant. . . I was told that the only way I could get my job back would be to lose the baby. I was very upset. No one was able to help. The union was unable to do anything and my doctor refused to sign the papers for disability because he said I could still work. A few days [after this] I miscarried the pregnancy. A-40-41.

26/ Legis. Hist., supra note 7 at 61-62. See A-48, A-68, and A-58.

B. By Assuring Equal Employment Opportunities, Congress Intended To Improve The Health And Well Being Of Women And Their Families.

Testimony before Congress during the hearings on the PDA documented the link between all types of discriminatory employment practices and the health and well being of women and their families. Congress recognized that when women are denied access to good jobs and adequate benefits, their families -- especially the children [27] -- suffer the consequences.

> The loss of a mother's salary will have a serious effect on the family unit, making it difficult for parents to provide their children with proper nutrition and health care. For some women and their families, it will mean dissipating family savings and security, or being forced to go on welfare.[28]

Income is inversely related to nutritional deficiency in children,[29] and both are linked with a host of negative health effects including delayed growth, weakened resistance to infection and increased vulnerability to environmental

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[27] The risk, of course, extends to adults as well. Unemployed workers who are unable to provide for their families face heightened risk of disease poverty, and malnutrition. Physician Task Force on Hunger in America, "Malnutrition, Ill-Health, and Hunger" in Hunger in America (1985) at 128-29 (hereinafter "Hunger in America") See, Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong. 2d Sess. (1984).

[28] Legis. Hist., supra note 7 at 3 (statement of Senator Williams). This is no hyperbole:

> When I began earning more money [at the factory] I took out a personal loan to help me get ahead on some of my other bills. I was not rehired [after a layoff and because of pregnancy]. The factory also discontinued my insurance coverage. . . . Since March of 1989, I have had no income, no insurance and am currently receiving AFDC. A-60.

[29] Hunger in America, supra note 27 at 115.

toxins.[30] Ironically, children from poor families are at particular risk of lead exposure, and black children face the greatest risk.[31]

In general, there is a higher frequency of health problems among poor children. Poor children receive less medical care than wealthier children; they are more likely to suffer from medical illnesses and more likely to experience

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30/ Id. at 99, 116, 118-122; Ebuonu and Starfield, Child Health and Social Status, 69 Pediatrics 550 (1982).

31/ In 1980, the proportion of children with blood leads in excess of 30 ug/dl in families with annual incomes less than $6,000 was nearly ten times greater than the proportion in families with incomes in excess of $15,000. For children in families with incomes from $6,000 to $15,000, the proportion was nearly four to one. Lead from paint in deteriorating housing and high air lead levels in inner cities are the primary sources of childhood exposure. Controlling for all other variables, it was found that black children have higher blood lead levels than white children. Mahaffey, et al., National Estimates of Blood Lead Levels: United States, 1976-1980, 307 New Eng. J. of Med. 573, 577 (1982).

adverse consequences from illness.[32] The developmental hazards associated with poverty and malnutrition may be exacerbated by school absences or other health-related curtailments of normal childhood activities.[33]

Full access to employment opportunities is also significant to the health of women and their families because critical benefits such as medical insurance are most commonly available in larger firms [34] and in unionized, male dominated

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32/ Starfield, Family Income, Ill Health, and Medical Care of U.S. Children, 3 J. of Public Health Policy 245, 247 (1982). At every age level and for every cause of death, poor children die at a higher rate than non-poor. Department of Human Services, State of Maine, Children's Deaths in Maine, 1976-1980 (Final Report) (1983).

33/ Hunger In America, supra note 27 at 101.

34/ See, Pepper Commission Documentation of Findings, Prepared for Bipartisan Commission on Comprehensive Health Care 7 (Nov. 13, 1989, unpublished).

occupations.[35] It is not surprising, therefore, that among women of childbearing age, those most likely to be uninsured are either unemployed or working in low wage jobs.[36]

Lack of adequate insurance has specific negative health consequences.[37] The uninsured are more likely to delay seeking medical care.[38] Many uninsured children are treated only in response to an immediate crisis and seldom receive

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35/ Kamerman and Kahn, "Employers' Response to Their Employees" in The Responsive Workplace: Employers and a Changing Labor Force 60-61 (1987).

36/ Adolescent Pregnancy Prevention: Prenatal Care Campaign, Children's Defense Fund, The Health of America's Children: Maternal and Child Health Data Book 48 (1989) (hereinafter "Health of America's Children"). Black women are more likely to be uninsured than their white counterparts. Id.

37/ See Supporting A Family, supra note 12 at 54.

38/ Gold, et al., Health Insurance Loss Among the Unemployed: Extent of the Problem and Policy Options, 8 J. of Public Health Policy 44, 54 (1987).

essential preventative pediatric services.[39] This is also true in insured, but low income families, since many policies require significant employee contributions,[40] have high deductibles and/or exclude the cost of preventative care.[41]

Pregnant women's income and insurance benefits bear directly on the likelihood of good pregnancy and birth outcomes. Congress specifically acknowledged the

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39/ Supporting A Family, supra note 12 at 57.

40/ Family income is correlated not only with presence of insurance coverage, but also with the extent of employer contribution. Only 27.3% of the children in poor but working households were covered by a plan fully subsidized by the employer in 1986. Health of America's Children, supra note 6 at 45.

41/ See, A Vision For America's Children, supra note 20 at 9. The uninsured and inadequately insured can, and do incur substantial out-of-pocket health care expenses, sometimes exceeding 20% of family income. Supporting A Family, supra note 12 at 56.

"concrete connection between loss of income during pregnancy and a deterioration of the health of the pregnant woman and her child which results from impaired access to a healthful life situation."[42/] Lack of prenatal care and inadequate maternal nutrition, both of which are correlated with poverty,[43/] are also strongly associated with low birth weight and prematurity, the causes of most infant morbidity and mortality in the United States.[44/]

42/ Legis. Hist., supra note 7 at 65.

43/ It has been demonstrated repeatedly that financial constraints are the most significant obstacle to attaining adequate prenatal care, Health of America's Children, supra note 6 at 52, and poverty is, of course, linked with nutritional deficiencies.

44/ See, Binsacca, et al., Factors Associated with Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also, Children and Families, supra note 15 at 39. It has been found, (continued...)

The cost effectiveness of prenatal health care has been well documented,[45/] and this fact was repeatedly emphasized in testimony presented to Congress by the American Nurses Association in support of

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44/ (...continued)
for example, that babies born to mothers who received no care were:
(1) over six times more likely to be born prematurely;
(2) over three times more likely to be low birthweight;
(3) four times as likely to measure low Apgar scores at birth; and
(4) two-and-a-half times more likely to require intensive care. See Moore, et al., "The Perinatal and Economic impact of Prenatal care in a low socioeconomic population" (1985) (unpublished manuscript).
Some of these outcomes have been specifically linked to inadequate maternal nutrition. See, e.g. Hunger in America, supra note at 117.

45/ See, e.g. Children and Families supra note 15 at 39 ("early, comprehensive prenatal care. . . saves over $3 for each $1 invested.") Regular pediatric care is also cost effective. See, A Vision For America's Future, supra note 20 at 12 (Children receiving such care have annual health care costs 10% lower than children not receiving such care).

the PDA.[46] The evidence was a critical element in Congress' assessment of the overall costs associated with employment discrimination against women. Responding to employers' arguments that the PDA would increase the costs of employing women, Senator Williams, one of the sponsors of the legislation, stated:

> We must also consider the cost which is imposed on society when working women and their families are denied adequate income for a decent standard of living. This cost is felt in terms of medical complications for both the women and their children ....[47]

Congress perceived that the threat to women, their children and other dependents was substantial, and that the price tag of

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[46] Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 466 (1977) (Statement of American Nurses' Association).

[47] Legis. Hist., supra note 7 at 65-66.

discrimination was high. It concluded that full access to employment was the necessary and appropriate response. Johnson Controls would have the Court reevaluate the Congressional equation and find it invalid. But striking this balance is a matter of social policy, therefore a job for Congress, not the courts. Moreover, the conclusion reached by Congress twenty-five years ago, and reaffirmed twelve years ago, remains valid.

C. Congress Sought To Eliminate Stereotypes That Limited Women's Employment Opportunities.

Johnson Controls' policy assumes that all women who are capable of becoming pregnant will do so, indeed that they might be pregnant at any moment. The policy applies to all women, regardless of their circumstances, their desire to become pregnant, or the likelihood of

pregnancy.[48/] Even though most women do become pregnant at some time in their lives, it is the grossest form of stereotyping to assume that every woman who is capable of conceiving is always about to do so. Once again, the policy at issue in this case threatens a principal purpose of Title VII: to eliminate decision-making based on group characteristics, especially when the result is to deny job

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48/ As noted above, the company's policy, is similar to many others in its total disregard for the individual factors relating to the likelihood of pregnancy.

> At this time [when the policy excluding fertile women was introduced] I was married and had no plans to have any children. I thought that I would be exempt from the policy because my husband had a vasectomy. However, the plant manager told me that even though my husband had been sterilized, I could still "screw around". A-37-38.

See also A-51-52.

opportunities to individuals capable of working. The Court has cautioned that:

> Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978).

Here, in fact, the generalization is not only impermissible, it is also not true. The probability of bearing a child depends on a number of factors including marital status,[49/] sexual orientation, family situation, age, number of existing

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49/ Johnson Controls' policy applies to women of all ages. Pet. App. at 72a-73a. (Posner, J. dissenting). However, the birth rate is near zero at age 40, with only a 0.39 percent probability that a woman between the ages of 40 and 44 will give birth and a 0.02 percent probability that a woman age 45 to 49 will give birth in a given year. U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States (1987) at 59 (1984 rates).

children, birth control method[50] and attitude toward abortion. Women's role in the workforce are also significant to their reproductive choices. The fertility rate in the United States in the last decades has declined steadily,[51] a trend that is both a cause and an effect of women's increased participation in the labor force.[52]

50/ The risk of unintended pregnancy among fertile, sexually active women is only 6.5%. Public Health Service, U.S. Department of Health and Human Services, No. 182, Advance Data, Contraceptive Use in the United States, 1973-88 (March 20, 1990). Only slightly more than half of unintended pregnancies (53%) will result in a live birth. R. Gold, Abortion and Women's Health, A Turning Point For America (1990) at 11.

51/ See Children and Their Families, supra n.15 at 9.

52/ P. Roos, Gender and Work: A Comparative Analysis of Industrial Societies, (1985) at 15, 121-22. In the last ten years, women have accounted for more than three-fifths (62%) of the increase in the civilian labor force. Facts on Women Workers, supra note 14 at ¶1.

During the duration of the company's voluntary program (1979-1983), in which women were allegedly counselled about workplace risks associated with pregnancy,[53] there were only 8 pregnancies

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53/ The explanation and release signed by each female employee read as follows:

> Lead's effect on the adult person is well understood and we keep people safe and healthy. . . But when it comes to the effect of lead on an unborn child, we know a lot less. . . .but we do know enough to be able to tell you that there are some risks. . .of [a spontaneous] abortion. . .[T]he evidence [of any such risk] is not as clear, for example, as the relationship between cigarette smoking and cancer . . . there is some evidence that animals fed or exposed to airborne lead run the risk of having congenitally affected offspring. . . .

Affidavit of Jean Beaudoin, Exhibit J (Globe Union Policy Guidelines for Women in Lead Exposure)(emphasis supplied). Women were not guaranteed transfers to comparable jobs during pregnancy.

among approximately 275 female workers.[54] The numbers suggest that the risk of harm to future children of Johnson Controls female employees is very small indeed. Moreover, given the small number of women involved, it is difficult to understand why the company made no effort to treat women on an individualized basis.

Nevertheless, Johnson Controls seeks to bar all women because a few will become pregnant. Its policy is based solely on class characteristics that do not necessarily apply to individuals and are not job-related. This is precisely the type of decision-making that is an anathema to Title VII.

54/ Id. Exhibit K (Selected Pregnancy Data For Plants Under Voluntary Fetal Protection Program). Affidavit of Eunice Williams dated Nov. 27, 1984, ¶4 (establishing number of women employees).

D. Congress Intended To Enable Women To Combine Employment And Family Life.

Congress was aware that the PDA would preclude employers from adopting policies that restricted women's employment to protect the fetus, but declined to carve out a special exception based on such concerns.[55] Moreover, the Senate was particularly troubled by the possibility that restrictive employment policies based on pregnancy might force women to have unwanted abortions in order to keep their jobs.[56]

55/ The Chamber of Commerce opposed the legislation, in part because the PDA would prohibit employment decisions based on concerns for the health of a pregnant woman or her child. The issue was raised in the hearings in a question to Andre Hellegers, M.D. who testified that men and fetuses all require equivalent protection. See APHA Brief.

56/ See, e.g., Legis. Hist., supra note 7 at 116 ("One of our basic purposes in introducing this bill is to prevent the tragedy of an unwanted

(continued...)

As a result of these concerns, Congress repeatedly emphasized that Title VII was intended to enable women to combine work and family life and to permit them to make personal decisions without employment related consequences. The language varies, but the message is clear and consistent. Congress sought to offer women "protection and security without fear of reprisal due to their decision to bear children"[57/] and to "put an end to an unrealistic and unfair system that forces women to chose between family and

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56/ (...continued)
abortion forced on a woman because she cannot afford to leave her job without pay to carry out the full term of her pregnancy"). Congress also addressed the possibility that employers might attempt to impose their own ethical values on employees and retaliate against women who had abortions. See e.g., id. at 117.

57/ 124 Cong. Rec. 21440 (1978) (Remarks of Rep. Chisholm).

career[.]"[58/] Indeed, the "entire thrust" of the PDA was "to guarantee women the basic right to participate fully and equally in the workforce without denying them the fundamental right to full participation in family life." [59/]

The policy at issue in this case, which conditions full employment rights on women's willingness to relinquish their fertility directly contravenes the legislative intent.

58/ 124 Cong. Rec. 21442 (1978) (Remarks of Rep. Tsongas). This is precisely the problem presented by the type of policy adopted by Johnson Controls.

> . . . Generally I'd say that I felt less a woman because of the operation. I think that though my marriage was in bad shape, my sterilization made things even worse. . . . [It has] even affected my second marriage. Both my second husband and I would have very much liked to have had a child together. In fact I tried to have the operation reversed, but was not successful. A-53.

59/ 123 Cong. Rec. 29658 (1977) (Remarks of Senator Williams).

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In sum, Congress clearly considered the economic, social and personal costs incurred when women are denied good jobs and employment security. It weighed the benefits of full employment against the costs of opening jobs to women and struck the balance in favor of full and equal employment opportunities.

II. The Plain Language Of Title VII Clearly Reflects Congress' Objectives To Prohibit Policies Like Johnson Controls.'

A. The Statutory Mandate is Unambiguous and Must Be Enforced.

Congress' decision to provide women full and equal employment rights, including the right to make their own choices about working, was expressed in the clearest of statutory mandates. Title VII prohibits employment discrimination on the basis of sex, including "pregnancy, childbirth or

related medical conditions". Further, it requires that women, including those affected by pregnancy childbirth or related medical conditions be treated the same "for all employment related purposes. . . as others not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).60/

The PDA restated Congress' original intent to prohibit all forms of sex discrimination. 61/ This Court recognized

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60/ The Act's sole affirmative defense, BFOQ, permits exceptions based only on occupational qualifications, i.e., qualifications associated with job performance, and this is consistent with the clear intent and plain language of the PDA. This Court has not addressed the meaning of the BFOQ defense in a sex discrimination case brought after the adoption of the PDA, but prior interpretations are consistent with the understanding that the defense must be closely linked to performance of important job functions. See Dothard v. Rawlinson, 433 U.S. 321 (1977) and Western Air Lines v. Criswell, 472 U.S. 400 (1982).

61/ Prior to enactment of Title VII, rules barring marriage and motherhood for female

(continued...)

this Congressional purpose recently, in California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987). Despite divergent views on the applicability of the Act in other contexts, eight members of the Court agreed that the PDA prohibits intentional discrimination against women who are or might be pregnant, but who are able to work.

The majority opinion acknowledged the controlling significance of the "ability or inability to work" language of the statute:

61/ (...continued)
employees were commonplace. E.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). Pregnant women were placed on mandatory maternity leave, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and were denied accrued seniority and other benefits. Cf. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). Pregnancy was widely excluded from employment-related health insurance and disability plans. Gilbert v. General Electric Co., 429 U.S. 125 (1976), Geduldig v. Aiello, 417 U.S. 484 (1974). The legislative history of the PDA reveals Congressional intent to solve the problem of sex and pregnancy discrimination definitively.

the "second clause was intended to . . . illustrate how discrimination against pregnancy is to be remedied." Cal Fed, 479 U.S. at 285. This reading was necessary to effectuate the Congressional purpose "to provide relief for working women," id. at 286, and to "'protect [them] from the full range of discriminatory practices.'" Id. at 299 n.3 (White, J., dissenting).

Justice White, writing for himself, Justice Powell and Chief Justice Rehnquist, disagreed with the majority's conclusion that the statute permits state mandated preferential treatment of pregnant workers,62/ but had no disagreement regarding its absolute prohibition on the type of discriminatory practice involved

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62/ Unlike Cal Fed, there is no suggestion here that the policy at issue might help "'to achieve equality of employment opportunities and remove barriers.'" Id. at 288, quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

here. Quoting from the Senate Report that "'treatment of pregnant women...must focus ...on the actual effects of their condition on their ability to work'," Justice White noted that the "'ability to work'" language means "'exactly what it says in a situation where it is directly implicated.'" Id.

The opinions of the members of the Court sitting in the Cal Fed case evidence virtually unanimous recognition of the PDA's purpose to eradicate all forms of discrimination against women based on sex or childbearing capacity.[63/] As the Court acknowledged, the commitment to provide women full employment rights was conditioned only on the "ability to work" standard.

63/ Justices Stevens and Scalia, concurring, addressed other issues not relevant here, but indicated no disagreement with these principles as articulated in the majority opinion.

This result is not surprising. Numerous decisions of this Court have reiterated that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive." Consumers Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980). The duty of the federal courts to enforce the plain language of federal statutes precludes independent judicial assessment of the wisdom of Congress' decision:

> Our individual appraisal of the wisdom or unwisdom of a particular course selected by Congress is to be put aside in the process of interpreting a statute.

TVA v. Hill, 437 U.S. 153, 194-95 (1978).

Even if this Court, like the majority of the Seventh Circuit, were to disagree

with Congress' conclusion that employers may not substitute their evaluation of the risks and benefits of work (including the risks and benefits to current and future children) for the decisions of women themselves, it is bound by the Congressional decision to the contrary, precisely because certain judgments are committed to the legislative process:

> [The Court has] no expert knowledge on the subject, much less do we have a mandate from the people to strike a balance of equities. . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck.

Id. at 194.

B. The Possibility That Employer Costs Will Increase As A Result of Women's Employment Does Not Affect the Statutory Mandate Against Discrimination.

Departures from the statutory mandate are not permitted even if additional costs may result from compliance:

> Even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country.64/

As a result, the Court has invalidated the use of accurate, sex-based actuarial tables in setting pension and life insurance rates, notwithstanding the fact that use of non-discriminatory tables would arguably increase employer costs. Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702. See also Arizona Governing Committee v. Norris, 463 U.S. 1073, 1084-65 n.14 (1983) ("the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based plan.") Thus, even if women did require additional protections from occupational exposures,

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64/ Legis. Hist, supra note 7 at 48.

Title VII would require that employers bear the costs of making the workplace safe.65/

Johnson Controls did not assert a cost-based defense to this Title VII action, presumably in recognition of the Court's unambiguous holdings on the issue. Nevertheless, the issue is addressed in the opinions in the court below.

The costs of providing equal employment opportunities in the face of

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65/ Congress has sought to minimize the risks of employment for both working women and men through the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., which requires that health protection be afforded at the "most protective" level, subject to constraints imposed by technological and economic feasibility. American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981). It is entirely appropriate that the cost issue be addressed by a regulatory agency and on an industry-wide basis. See APHA Brief. A Title VII defense based on firm-specific "clean-up costs" would reward the least efficient employers by allowing them to discriminate while putting more viable concerns at a competitive disadvantage. Such a defense could also result in irrational and inconsistent application of the statute, even within a single jurisdiction.

recognized reproductive hazards might include not only the cost of making the workplace safe, but also the cost of potential tort liability to children of workers exposed to lead.66/ Judge Posner, in dissent, was particularly concerned with the second issue and suggested that such liability might at some point "become large enough to affect the company's normal mode of operation and supply the ground for a

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66/ In addition, both Judge Posner and the majority expressed some concern about the costs to society for caring for children who might be harmed by women's occupational exposure. Indeed, despite the lack of any documentation, the majority relied on these potential costs to support its conclusion that the policy was justified. Pet. App. at 51a. This approach is legally insupportable and totally inconsistent with Congress' conclusion that the social cost of denying women equal employment outweighed countervailing concerns. The majority balanced the interests of "the employer, the employee, and the unborn child," Pet. App. at 42a, as if this were not a legislative function, and more importantly, as if the balance had not already been struck by Congress on the basis of careful consideration and extensive evidence. See Point I, supra.

bona fide occupational qualification." Pet. App at 68a. As noted above, this approach lacks statutory or precedential authority and indeed simply ignores the PDA's command that women who are able to work must be permitted to do so.

There are, however, additional reasons to reject the suggestion that the potential for tort liability should constitute a defense in Title VII cases:

> In today's litigious society, the potential for litigation rests in almost every human activity....The employer is, of course, free to protect itself from financially ruinous lawsuits by purchasing insurance and maintaining the degree of care required by law.

Hayes v. Shelby Mem. Hosp., 726 F.2d at 1553 n.15. For a responsible employer, the risk of liability to children of female workers is remote, as discussed below. In any event, there is also a risk of liability to children of male workers, as

well as to consumers and others.[67] Johnson Controls and other employers with similar policies undertake these risks as a part of doing business. They have presented no reason to suggest that any liability-related concerns associated with women's employment cannot be handled in precisely the same manner.

Finally, permitting a defense based on potential liability would undermine the

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67/ Becker, supra note 21 at 1236-37, 1245. (noting instances in which the children of male workers assert paternally-mediated genetic injury).

Johnson Controls can cite no suits brought by children of women workers exposed to lead. On the other hand, there has been a tort suit brought by male workers, their wives and children alleging intentional injury or gross negligence. Wade v. Johnson Controls, 693 F.2d 19 (2d Cir. 1982). There has also been at least one significant judgment against the company on the basis of defective products. Jones, et al. v. Sears and Roebuck, Inc., Globe Union, Inc., et. al., No. 585-427 (Cal. Super. Ct., San Diego County, May 17, 1987), appeal filed No. D009904 (Cal. Ct. App., 4th App. Dist., Div. 1, riled Apr. 10, 1990)($9.7 million jury verdict for plaintiffs injured by exploding battery).

deterrence and safety-enhancing goals of tort law. An employer who complies with OSHA standards, implements available technology to reduce exposures and adequately warns employees of remaining but unavoidable risks is not likely to be held liable to subsequently born children on either a negligence or strict liability theory.[68/] A cost-based defense would

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68/ See generally, 1 S. Pegalis and H. Wachsman, American Law of Medical Malpractice at 98-103 (1980) and 2 M. Dixon and F. Woodside, Drug Product Liability §11.02[1] (1989); Hughson v. St. Francis Hospital, 459 N.Y.S.2d 814 (N.Y. App. 1984) (pregnant woman's consent to medical procedures is binding on subsequently born child); Needham v. White Laboratories, 847 F.2d 355 (7th Cir. 1988), (adequate warning provided to pregnant women sufficient to preclude "failure to warn" claim by later born child). In the medical malpractice context, the informed consent decisions are premised on respect for personal autonomy and the notion that competent adults should be permitted to make reasoned risk assessments for themselves and minor children (and fetuses). This approach is, of course, consistent with that taken by Congress in Title VII, see, Point I, supra, and effectively disposes of Judge Posner's concern about the problem of irreducible risks. See Pet. App. at 66a and 69a.

therefore eliminate any incentive created by the tort system to make the workplace safe, while giving employers wholesale license to exclude any class of workers they deem, for whatever reason, particularly vulnerable.

C. The Court Below And Other Courts Of Appeals Have Failed To Implement Title VII As Congress Intended.

In its decision to permit a "business necessity" defense, the court below purported to follow two decisions rendered by other circuits.[69/] Both of those cases, however, represent significant departures from the statutory scheme, as it has been consistently interpreted by this Court.

In Wright v. Olin Corp., the court acknowledged that a sex-based policy of exclusion could not satisfy the BFOQ

69/ Wright v. Olin Corp. 697 F.2d 1172 and Hayes v. Shelby Mem. Hosp., 726 F.2d 1543.

standard, 697 F.2d at 1185-86, n.21, and then rejected that analysis specifically to permit a defense, predictably distorting Title VII in the process. While it is true, as that court notes, that a Title VII plaintiff may advance different theories, it is not correspondingly true that a defendant may proffer any defense regardless of the nature of the prima facie case. Rather, the defense, to be availing, must specifically match the gravamen of the claim.

Claims and defenses in Title VII cases can be generally grouped in three separate tiers. At one level is the individual disparate treatment case, in which intentional discrimination is inferred from differential treatment. Articulation of a non-discriminatory reason provides a defense to the prima facie case, which can

then be rebutted by proof that the proffered explanation is a pretext for discrimination.[70] Intent is irrelevant in disparate impact cases, which focus on the effects of discrimination, as shown by a statistically significant effect of a neutral policy on a protected group. The employer must show that "the challenged practice serves, in a significant way, the legitimate employment goals of the employer."[71] Finally, overt facial discrimination can only be justified by the most rigorous standard, BFOQ, and is

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70/ E.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The inapplicability of this analysis to cases involving overt discrimination is conceded in Wright and Hayes. Cf. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

71/ Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115 (1989) ("business necessity" defense).

otherwise flatly prohibited. See p. 45 n. 60, supra.

A sex or pregnancy-based policy cannot be deemed "neutral." Title VII has been amended specifically to preclude that construction. See Point IIA, supra. Nevertheless, the Wright court applied the lower level business necessity defense, which was crafted for cases not involving intentional or overt discrimination. Congress clearly stated that where overt or intentional discrimination is involved, the challenged practice can be justified only as a BFOQ. The approach adopted by the Fourth Circuit is thus unauthorized, illogical and, as a matter of law, must be rejected.72/

72/ See also Becker, supra note 21 at 1251, 1260-63. This distinction between overt discrimination and discrimination resulting from neutral practices is not mere "semantic quibbling," (continued...)

The Hayes court embraced a different, but related, error in its desire to permit a defense. Ignoring the male and female employee/parents who are the intended beneficiaries of Title VII, that court decided that a policy that protected their offspring "neutrally," i.e.. provided the same level of protection, was a "neutral policy," justifiable by business necessity. But, once again, Title VII unequivocally rejects any contention that an overt pregnancy or sex-based policy can be

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72/ (...continued)
Wright, 697 F.2d at 1186, but has substantial significance. Under Title VII, the employer has always borne the burden of proof to justify a demonstrably discriminatory policy. E.g., Dothard v. Rawlinson, 433 U.S. 321. That rule has been altered in cases involving disparate impact, but not in those involving intentional discrimination. Compare Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115 with Price-Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (mixed motive).

"neutral,"[73] regardless of its effect on offspring. By definition, it is not neutral with respect to workers, who may nor may not become parents, and it is their rights Title VII protects.

The Supreme Court has unequivocally rejected the notion that sex-based classifications can somehow be justified because of arguably "neutral" effects:

> . . . the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department.

73/ It was precisely this fiction the PDA was intended to eliminate. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669. (1983).

Manhart, 435 U.S. at 716. This Court has also held that it is no defense to intermediate acts of discrimination that the final result of an employment process, or "bottom line," is non-discriminatory. Connecticut v. Teal, 457 U.S. 440 (1982). Thus, even if the "bottom line" - the effect on offspring - were the same for women and men, it remains true that women are subjected to discriminatory treatment because Johnson Controls' policy and others like it impose on them terms and conditions of employment which are not applied to men.

In sum, the disparate treatment "business necessity" analysis applied in Wright, Hayes and the court below is inappropriate here. Johnson Controls' policy can be justified only as a BFOQ. However, because women can perform the jobs at issue, this defense is unavailing as a

matter of law. A contrary result would conflict with the plain language of Title VII and the central goals underlying the legislation.

CONCLUSION

Wherefore, amici urge the Court to reverse the decision of the Seventh Circuit and remand with instructions to enter judgment for petitioners.

Respectfully submitted

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APPENDIX

Statements of Interest of Organizational *Amici Curiae*

The **AMERICAN CIVIL LIBERTIES UNION (ACLU)** is a nationwide, non-partisan organization of over 250,000 members. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment and discrimination against women of childbearing capacity. The **American Civil Liberties Union of Wisconsin** is the Wisconsin state affiliate of the ACLU.

The **AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (ACTWU)** is an international trade union, with 260,000 members in the apparel, textile and related industries. It has many members -- both women and men -

- exposed to lead and other reproductive chemical hazards in a wide variety of industries. Many of these workers will be directly affected by the principles established in this case.

The **AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW)**, a national organization of over 140,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUW supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.

The **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, (AFSCME)**, which represents approximately one million public employees, is the nation's largest public employee labor union. AFSCME represents many men and women in the health care and sanitation industries whose jobs continuously expose them to hazardous toxic substances and chemicals.

The **AMERICAN FRIENDS SERVICE COMMITTEE** has since 1917 been active in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. The AFSC carries out its work as a service agency of the Society of Friends in America. The AFSC has a vital interest in this litigation because of our belief in the infinite worth of each human

being and the equality of all human beings in the sight of God. This belief has led the AFSC to commit a significant portion of its resources to work which seeks to root out the causes of violence in society which lie in poverty and imbalance of wealth, in exclusion, and denial of rights.

AFSC works in this country and in other parts of the world in support of the efforts of women to have access to jobs that provide adequate income in workplaces that are free of hazards. We have worked for the past decade, in parts of Appalachia in support of women challenging exclusion from jobs in coal mining and road construction, the only well-paid jobs available to people without college degrees.

In addition AFSC has worked along the Mexico-U.S. border for more than twenty

years in programs dealing with health, human rights and economic development. In the 1970s we became concerned about the impact of maquiladoras, the foreign-owned assembly plants located in Mexico along the border between the two countries. We have seen vividly the impact on the health and safety of the young women who work at extremely low wages - $4 a day or less - in plants which give little attention to health and safety considerations. One of these plants is owned by Johnson Controls in Reynosa, Mexico, making automation controls, including day long work with lead solder. Our staff report that the company does not provide warnings in Spanish of the danger of lead exposure to fetuses, does not test workers' blood and actively recruits young women workers.

Thus for us, the present case deals with issues of exclusion and of safety in which we have a longstanding and profound interest.

The **ASIAN IMMIGRANT WOMEN ADVOCATES (AIWA)** educates and organizes Asian immigrant women employed as seamstresses, hotel maids, waitresses, nursing aides, and electronic assemblers. Many of these immigrant women suffer from extremely poor working conditions and occupational hazards. For instance, the electronics industry has a high rate of occupation related illnesses compared to other businesses. Environmental pollution is also a problem in neighborhoods near electronic plants, where toxics have been discovered in the water and residents have reported a higher incidence of birth defects and miscarriages. Seamstresses

develop respiratory diseases, eye strain, and muscle pains from inhaling dust, threads and fabric dyes. Therefore, AIWA has a strong interest in the outcome of this case affecting the working conditions and rights of working women.

The **BOSTON WOMEN'S HEALTH BOOK COLLECTIVE** is a non-profit organization devoted to education about women and health. Its many projects and services include a women's Health Information Center, which is open to the public, and the extensive distribution of materials to the public about women and health. In addition, the Collective has authored a major publication concerning women and health, Our Bodies, Our Selves, which has been translated into thirteen foreign languages

The **CENTER FOR CONSTITUTIONAL RIGHTS** (CCR) was born of the civil rights movement and the struggle of Black people in the United States for true equality. CCR attorneys have been active in cases involving employment discrimination, voting rights, jury composition, and fair housing. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos. CCR attorneys served as counsel of record for the amici supporting the right of unwed mothers to employment in the public school system in Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976).

The **CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH** is a not-for-profit organization dedicated to workers' health and safety rights. Its members include 40 area union locals, individual organized and unorganized workers, concerned health providers, attorneys, educators, and others. It believes the Seventh Circuit Court of Appeals' decision in this case undermines the OSHA lead standard and the health of all workers. Furthermore, the decision simultaneously restricts women's employment opportunities and leaves men exposed to hazardous work conditions.

The **COAL EMPLOYMENT PROJECT** is a national membership organization of women coal miners and their supporters. Since its founding in 1977, CEP has supported women miners in efforts to open up mining

jobs for women, eliminate discrimination and harassment, and improve health and safety conditions for all miners. The outcome of this case is of vital importance to our membership.

The **COALITION OF LABOR UNION WOMEN** is America's only national organization for union women, with 75 chapters across the county and over 20,000 members representing 60 unions. CLUW is dedicated to ending job discrimination against women and minorities, defending the right of each woman to make reproductive decisions in private, and achieving safe and healthy working conditions for all workers.

The **COMMITTEE FOR RESPONSIBLE GENETICS** is a group of approximately 600 scientists and others concerned with social and ethical implications of biotechnology, including reproductive technology, which

promotes the broadest possible public participation in development of relevant decisions. The Committee for Responsible Genetics opposes exclusionary employment practices because they violate workers' civil rights and fail to ensure the reproductive health of all employees in the workplace.

The **COMMUNICATIONS WORKERS OF AMERICA (CWA)** is an international trade union, representing 650,000 workers in information industries. It has many members -- both men and women -- who are exposed to toxic chemicals in their work and therefore are directly affected by the principles established in this case.

The **CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.** was incorporated in 1973 as a non-profit public interest law firm advocating for women's legal rights. We

have over 500 members and serve thousands of people in New England each year through our litigation, community education, research and information and referral programs. We choose to join this case as an amicus curiae because we have worked with thousands of women workers who have suffered serious economic and personal losses as a result of workplace discrimination.

The **EMPLOYMENT LAW CENTER**, a project of the Legal Aid Society of San Francisco, is a private non-profit public interest law firm which specializes in employment discrimination. Founded in 1916 to represent individuals unable to afford legal counsel, the Center is dedicated to the eradication of all forms of employment discrimination including sex discrimination.

The Employment Law Center is counsel for Queen E. Foster in Johnson Controls, Inc. v. California (Fair Employment and Housing Commission and Queen Elizabeth Foster), which was recently decided in the California Court of Appeal and was denied review by the California Supreme Court. Ms. Foster applied for a position with Johnson Controls at their Fullerton, California plant and was denied employment because she refused to provide medical evidence documenting her inability to conceive children. In an unanimous opinion, the Court of Appeal ruled in Ms. Foster's favor and held that Johnson Controls "fetal protection" policy violated California's prohibition against discrimination on the basis of sex. Prior to representing Ms. Foster, the Employment Law Center participated as an amicus curiae

in Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

In the area of sex discrimination, the Employment Law Center has also filed amicus curiae briefs in the United States Supreme Court including California Federal Savings & Loan Association v. Guerra; Hopkins v. Price Waterhouse; Meritor Savings Bank, FSB v. Vinson; Rotary Club of Duarte v. Board of Directors of Rotary International; and Wygant v. Jackson Board of Education.

The **INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO** is a national labor organization headquartered in Akron, Ohio. It has over 300 affiliated local unions in over 500 bargaining units, representing about 40,000 hourly workers in the U.S. chemical industry. Many of its members are occupationally exposed to lead, as well as other chemicals. The Union is concerned

that a company may discriminate in work assignments rather than reducing exposure levels to make the workplace safe for workers of both sexes. This is a particularly critical concern with exposure to material such as lead, which has demonstrable reproductive effects for men as well as women.

The **MAINE LABOR GROUP ON HEALTH** is a statewide, non-profit organization dedicated to protecting the health and safety of Maine working people and their families. It provides worker educational programs and serves as workers' advocates within the health care system and in the public policy arena.

The **MASSACHUSETTS CHAPTER OF THE NATIONAL LAWYERS GUILD**, was founded in 1937, in part to counter the exclusionary policies of the American Bar Association

which at the time did not admit Black attorneys to membership, the NATIONAL LAWYERS GUILD and its MASSACHUSETTS CHAPTER have a long history of opposing exclusionary employment policies. The MASSACHUSETTS CHAPTER, with over 325 members, has a working committee on reproductive rights which is involved in legal and educational efforts to protect reproductive rights, including the rights of all workers to be free from reproductive hazards in the workplace. The organization is opposed to "fetal protection" policies unilaterally adopted by employers which exclude women of child-bearing capacity from jobs and employment benefits and fail to protect the health and safety of all workers - male and female.

The **MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MassCOSH)** is a coalition of 85 labor organizations, representing over 150,000 workers and 150 occupational health professionals in Massachusetts. MassCOSH is dedicated to improving health and safety conditions in the workplace through technical assistance, training, and education and political action. MassCOSH, which has a reproductive hazards project and regularly conducts workshops with member locals regarding reproductive hazards in the workplace, believes that all workers are entitled to a safe workplace.

The **MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)**, established in 1967, is a national civil rights organization headquartered in Los Angeles. Its principal objective is to assure, through litigation and education, the civil rights of Hispanics living in the United

States. Given the increased representation of Latinas in our nation's workforce, many of MALDEF's efforts are directed at eliminating discriminatory barriers to equal employment opportunities.

The **NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL)** has over 400,000 members in 41 state affiliates and the national organization. NARAL is dedicated to guaranteeing women the full range of reproductive choices, including the right to bear children without economic sanctions, which is critical to women's autonomy and equality.

9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN, is a nationwide membership group dedicated to improving the status and working conditions of office workers. For more than seventeen years, 9 to 5 has been concerned with bringing attention to the

health and safety hazards faced by working women. We strongly believe that employers should meet their legal obligations to provide safe workplaces to all workers, and are opposed to the exclusion of women as a substitute for correcting job hazards.

The **NATIONAL BLACK WOMEN'S HEALTH PROJECT** is a health, education and advocacy organization which works to improve the quality of life for African-American women. It works to promote non-discriminatory approaches to insure that all African-American women have access to health services, including abortion, that maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African-American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

The **NATIONAL COUNCIL OF JEWISH WOMEN**, founded in 1893, the National Council of Jewish Women (NCJW) is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's National Resolutions that include working for "employment policies which safeguard the dignity, rights, benefits, health and safety of all workers," it joins this brief.

The **NATIONAL LAWYERS GUILD** is a national organization representing over 8,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters

throughout the United States. Since its founding 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly committed and works actively to protect the rights of all people, and specifically the right of women to equal access to employment.

The **NATIONAL ORGANIZATION FOR WOMEN (NOW)** is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. One of its priorities is assuring the right to full employment opportunity without a sacrifice of health or reproductive rights.

The **NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO (NUHHCE)**, is a labor organization

representing approximately 38,000 professional and non-professional hospital and health care workers. Many of its members - male and female -are regularly exposed to numerous toxic substances and hazardous chemicals in their workplace and would be directly affected by the principles established in this case. Because of its historic and activist opposition to discrimination of all kinds and its concern for the health of all workers and the public, NUHHCE has a strong interest in this case.

The **NATIONAL WOMEN'S HEALTH NETWORK (NWHN)** is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's

right to have complete control over their bodies, particularly the right to decide when, where and how to give birth, and opposes policies which condition employment on the loss of fertility.

The **NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC)** is a nationwide membership organization dedicated to the election and appointment of more women to political office. NWPC also works to ensure equality for women in all aspects of life.

The **NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (NYCOSH)** is a non-profit membership organization dedicated to the right of all workers to safe and healthy working conditions. Its membership includes over 160 union locals and regional councils, as well as individual workers, medical and legal professionals and community activists, all working together

to eliminate workplace hazards. NYCOSH, which has a reproductive hazards committee, believes that exclusionary policies are not the appropriate solution to reproductive hazards in the workplace.

The **NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH PROJECT (NCOSH)** is a private, non-profit membership organization working to improve occupational safety and health conditions for all North Carolinians. Approximately 70 local unions representing 27,000 workers and 400 health and legal professionals concerned about occupational health are NCOSH members. NCOSH believes that exclusionary employment practices and policies are inappropriate and illegal solutions to the problem of dangerous occupational exposures. Exclusionary policies violate the rights of women to

pursue equal employment and the rights of all workers to a safe workplace.

NORTHWEST WOMEN'S LAW CENTER is a private, non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court and other courts.

The **OCCUPATIONAL SAFETY AND HEALTH LAW CENTER (OSHLC)** is a public interest law firm which represents individuals, families, organizations, and unions in health and safety matters. The OSHLC has an on-going concern with regard to

reproductive rights and the protection of both men and women on the job from any risk to those rights.

The **OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAW)** has 100,000 members, a substantial number of whom are employed in industries and are potentially affected by exclusionary employment policies similar to the one at issue in this case. The OCAW opposes exclusionary policies which single out members of one sex, and it actively seeks to develop and encourage the use of policies which will protect the health of all workers.

The **PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH (PHILAPOSH)** is a private, non-profit corporation which seeks to promote the health and safety of employees in Eastern Pennsylvania, Southern New Jersey, and the State of Delaware.

PHILAPOSH has approximately 175 affiliated local unions with a combined individual membership of over 200,000. PHILAPOSH has regularly participated in litigation which raises important health and safety issues, either as a party or as amicus curiae. Over the last several years, PHILAPOSH has presented a number of workshops and conferences on reproductive hazards in the workplace and issues of particular concern to women workers. PHILAPOSH has published a pamphlet, "Getting Job Hazards Out of the Bedroom."

The **PLANNED PARENTHOOD FEDERATION OF AMERICA (PPFA)** is a not-for-profit corporation organized in 1922. It is the nation's oldest and largest voluntary family planning agency. Its 180 affiliates in forty-three states and the District of Columbia provide medical, educational and

counseling services to meet the family planning needs of over two million Americans per year. PPFA believes that the ability to regulate one's own fertility is a basic human right and is concerned that female workers not be penalized in their exercise of that right. The organization further believes that this issue can and must be resolved in a manner that protects the health interests of all workers and their children without sacrificing the workers' rights to equal employment opportunity.

The **ROCHESTER COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (ROCOSH)** is a non-profit organization comprised of unions, health and legal professionals, industrial hygienists, educators, and concerned individuals who believe all working people are entitled to a safe and healthy

workplace. Our union affiliates represent about 32,000 persons. ROCOSH is interested in this case because of its belief that working people should not have to choose between making a living or preserving their life and health. Upholding Johnson Controls' "fetal protection policy" would pervert OSHA's mandate that employers provide a safe workplace and would threaten womens' employment opportunities. If allowed to stand, this decision could have implications for several workplaces in the Rochester area.

The **SANTA CLARA CENTER FOR OCCUPATIONAL SAFETY AND HEALTH (SC-COSH)** is a group representing 170 labor unions, workers and occupational health professionals in northern California, dedicated to improving health and safety conditions in the workplace.

The **SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)** represents 925,000 workers in the U.S. and Canada. Its workers work primarily in the service sector, in a broad spectrum of workplaces including hospitals, offices, and food service facilities where they are exposed to toxic substances that adversely affect reproduction and health generally. The use of exclusionary practices, instead of a comprehensive approach to health protection, could threaten the economic status of a large number of members.

SILICON VALLEY TOXICS COALITION based in San Jose, California, includes labor unions, environmental organizations, doctors and other public health workers, fire fighters, clergy, and neighborhood organizations. It advocates that industry and government must protect the public

health and works to prevent exposure of the public to toxic substances.

The **UNITED MINE WORKERS OF AMERICA, [INTERNATIONAL UNION (UMWA)]**, is a 100-year old organization which represents approximately 150,000 miners and retirees in North America. The UMWA is committed to the complete elimination of impediments to job opportunities based on race and gender. The UMWA believes that employers must remove and protect against work-related health hazards. Barring women or others from jobs due to those hazards is an evasion of the employer's responsibility for workplace health and safety. Moreover, such exclusionary policies do not promote safety because men remain exposed to the hazards. Rather, these practices shift the risks and burdens of an unhealthy work

environment to those least able to bear them.

The **WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY & HEALTH (WNYCOSH)** is an organization comprised of 60 area union locals (representing 55,000 workers) and a number of health professionals in the Western New York area. WNYCOSH is part of a consortium of organizations, including the Cornell-Chemical Hazards Information Program, the SUNY Buffalo Toxicology Research Center, and the Union Occupational Health Center Clinic which cooperate in providing educational and technical assistance services to workers in the region. WNYCOSH is concerned that any judicial decision that undermines the OSHA lead standard is inappropriate since there is evidence that lead constitutes a reproductive hazard for both sexes.

WIDER OPPORTUNITIES FOR WOMEN has worked nationally and in Washington, D.C. for twenty-five years to achieve economic independence and equality of opportunity for women and girls. WOW has a solid track record of achieving advances for women in economic policies, employment practices and employment and training programs. As an organization committed to improving the economic and employment status of women, WOW is deeply concerned about the protection of women's rights on the job.

The **WOMEN'S ECONOMIC AGENDA PROJECT (WEAP)** is a California state-wide, multi-racial, cross-class women's rights and empowerment organization. Our work includes the fight for public policies that support low income women, because women and children are the majority of the impoverished population. Today, both women

in the paid workforce and AFDC mothers worry about adequate income for food, rent, health care and decent and affordable child care. WEAP has a long standing policy against laws that block job and training advancement because of pregnancy, as well as other gender and race based discrimination policies.

WOMEN EMPLOYED, based in Chicago, Illinois, has a national membership of 3,000. It assists working women with problems of sex discrimination and health and safety issues. Because the policy at issue in this case threatens womens' employment rights, it is of particular concern to Women Employed.

WOMEN'S LAW PROJECT (WLP) is a non-profit feminist law firm which seeks to advance the legal and economic status of women through litigation, public education,

and individual counseling. During the past fifteen years of its existence, WLP's activities have included work in the areas of reproductive freedom, pregnancy discrimination, and employment discrimination. WLP is dedicated to eliminating discrimination against women based on childbearing capacity and to securing the right of women workers to equal access to safe workplaces.

WORKSAFE FOR HEALTHY COMMUNITIES is a coalition of organizations and individuals representing labor, business, environmentalists, health professionals, community based organizations, and others in California. Worksafe is dedicated to: (1) educating the public about the need for worker protection and the relationship between control of workplace hazards, community health and environmental

protection; and (2) seeking to ensure that California establishes an effective and comprehensive workplace protection program that will serve as a model for the nation. Worksafe opposes exlusionary employment practices because they fail to control toxic use at its source and result in discrimination against workers. Worksafe believes that an effective workplace and environmental hazard control program must seek to reduce and control toxic use, rather than controlling worker fertility.

Statements of Interest of Individual
Amici Curiae

STATEMENT OF INTEREST OF VICKY BUTTICE

I worked for five years in a high lead department of a chemical factory. Though the work was hard, the pay (about $13.00/hour) and benefits were very good.

I was told, both at my job interview and during the orientation on my first day

of work, that the research on the dangers of working around lead were still out and that there were no conclusions, either pro or con that could be drawn from the research. I was therefore surprised to learn after I had worked there for a while that management had introduced a policy which prohibited all women who could conceive from working in the high lead areas. At the time I learned about the policy I was also told that if I wanted to continue working around lead I would have to give personnel a letter from my doctor confirming that I could not have children.

At this time I was married and had no plans to have any children. I thought that I would be exempt from the policy because my husband had had a vasectomy. However the plant manager told me that even though

my husband had been sterilized I could still "screw around."

I was informed by a personnel representative that I could definitely keep my job in the high lead area if I would agree to being sterilized. However I would have to have an examination by the company doctor to determine if I could have children and sign a paper stating that I would not sue the company. I refused to sign the paper, and within a few days, I was laid off.

I eventually took a job at a fast-food restaurant at a substantial cut in pay. It took me a long time to find work after my layoff because the economic situation in my community and the surrounding area is very bad. There are no other companies within 20-25 miles of where I live that offer

comparable salaries or benefits to those of the chemical plant.

My layoff made things very difficult for both my husband and myself. When I began work at the chemical plant, we had taken a mortgage to buy our house. In addition to his full time job at the chemical plant, my husband had to take a part-time job in construction and work seven days a week. Even with my husband working so much, we were barely making ends meet. The loss of income from my salary also created a lot of tension between us. During that time we seemed to argue often over money and how we were going to pay our bills.

STATEMENT OF INTEREST OF CYNTHIA GARZA

In 1979 I began working for a battery manufacturer because that plant is the best place to work in my town in terms of its

salaries and benefits. I was hired as an order checker in the shipping department, but was transferred several times into jobs that paid more and gave me the chance to earn shift premiums, which helped a lot in paying my bills.

In 1985, I became pregnant a second time. The department where I worked at that time was not a high lead area, but when the personnel director learned that I was pregnant I was told that I couldn't stay on the job. I wasn't given any reason, and even my doctor said that I could continue working. The personnel director informed me that if I had wanted to keep my job then I shouldn't have gotten pregnant. I filed a grievance through the union for discrimination, but in a meeting I and the shop steward had with the personnel director, I was told that the

only way I could get my job back would be to lose the baby.

I was very upset. Nobody was able to help. The union was unable to do anything and my doctor refused to sign the papers for disability because he said that I could still work. A few days after my meeting with the personnel director, I miscarried the pregnancy. I had been approximately thirteen to fourteen weeks pregnant.

STATEMENT OF INTEREST OF PAT GRANT

In 1976 I began working in the foundry of an automobile plant. At that time I had one child.

The first time I learned about the policy excluding women of childbearing capacity was late in 1980, after I had already had my second child, when I was told to go to the company's medical department. They told me that I could not

continue to work in the foundry as an iron pourer because this job exposed me to a high level of lead. I was also told that in order to keep my job I would have to be sterilized. There were no exceptions to the policy, even though I told the medical people that I was then using birth control and had no plans for becoming pregnant. I objected to the policy and, along with other women in the plant, filed a grievance with the union against the company for discrimination. The union negotiated a slightly modified policy with the company and I remained on my job.

Between 1979 and 1983 I was laid off due to a general work slow down. When I was called back to work I was transferred to iron pouring. However after a few weeks I was removed again because of the policy and as a result I filed charges of

discrimination and harassment with a state agency. Because of my complaint I was harassed and threatened with discharge. However because of my seniority I transferred to another department and have only worked in iron pouring as a temporary replacement for another worker for three months in 1985.

After the policy was modified all the women were closely monitored for blood lead levels and if their lead level was too high they were either moved to another department where the air lead level was lower or they had to wear respirators. Transfer to another department meant losing about $.45 or $.50/hour in salary. There was also less overtime and weekend work in the low lead departments.

In 1984, two women were removed because they had high blood lead levels and

told they could not return even when their lead level dropped to normal because the air lead level was too high. However again, I was allowed to work their overtime, probably because I had filed the charges. By the end of 1984 I was under a lot of stress. I was always under pressure on my job because of harassment from my foreman. The company had modified its policy somewhat, and other women were allowed to return to high lead areas, but I was not, except as a relief worker. Even after several years, I don't feel that my job in the melting department is secure, because could move me at any time. I also think the policy is psychologically degrading because keeping my job doesn't really depend on whether I'm good at my work or have seniority, but hangs only on whether I can have children.

I liked my job as an iron pourer very much and don't want to work at anything else. However I have not been able to return to this job on a steady basis. The company has no openings in the skilled trades and they are not adding new jobs. There are also no other companies in this area of the state that pay as high a salary and offer such good benefits as the automobile plant.

STATEMENT OF INTEREST OF ALVA LEWIS

I have been employed in an automobile plant for twenty-five years, and work in the skilled trades as a millwright. I believe that the plant has always had a policy of testing the blood/lead levels of people who worked in the high lead areas. However, I don't believe this policy was routinely enforced. For example, my brother worked in the foundry and the

melting area melting ore for about twenty-six years, but as far as I know he had only one blood test. In 1978 or 1979, he was tested and had a very high blood/lead level. In 1980 or 1981 he collapsed on the job melting ore (iron) in the melting area.

My brother was forty-four years old when he had the heart attack, and due to the events surrounding his heart attack, I strongly believe his heart attack may very well have been caused by the many years he spent working in the high lead melting area and nearby areas.

When the company enforced its policy with respect to women working in the high lead areas, I was a union Committeeman At Large and at first I thought it was a good idea. However I, and the other representatives, also recognized that the jobs in these areas paid higher wages and

often offered more overtime than jobs in other departments in the plant. After debate and consultation the union decided to support the women because we thought that the policy discriminated against women who wanted and probably needed to work in the high paying jobs to support their families.

The foundry is a very hot and dirty area of the plant and after having fabricated, installed and repaired industrial ventilation systems at this plant for the past twenty-five years, and after having had training in industrial ventilation engineering I am aware that many measures can be taken to improve this workplace. However we have two major problems with achieving this goal. One is after management has spent thousands and even millions to install a system, they

assume the systems will last forever and ignore the need to maintain them. They also allow amateurs who have great authority and no expertise to modify the systems to suit a particular temporary need which soon results in decreasing the efficiency of the system and in some cases nearly destroying it.

STATEMENT OF INTEREST OF JEANNE PATTERSON

I began work at the electronics company in 1979. At that time I was married, but we did not have any children. I was a specialist in etching and enjoyed the work very much. It required dexterity and I found it challenging.

When I was hired I wasn't told about any personnel policy regarding pregnant workers, or about hazards in the workplace. But when I became pregnant with my first child, my supervisor told me that I had to

have my doctor sign a form authorizing my working with certain chemicals. Before signing the form my doctor asked me whether I wanted to keep my job. He was the one who told me that if the form was not signed, I would not have a job.

I worked throughout my first pregnancy. But after my maternity leave, I was told that there was no job available for me and that I would be called in when something opened up.

I was finally called back to work and in a few weeks went on graveyard shift. Later I became pregnant a second time and informed my supervisor. This time my doctor refused to authorize my working with chemicals. I was told by personnel that it would be difficult for them to find me another job in the company because my salary was so high and because my skills

were in jobs that involved exposure to chemicals. After a couple of weeks, I was finally offered an interview for a job in another area, but it would have meant taking a 45 percent pay cut.

Financially, my layoff created difficulties. Our rent was raised twice during this time and there were many nights that I stayed awake worrying about paying bills.

After my maternity leave, I called the company and told them I was ready to return to work. After about two months, I was given a job, but with a loss in seniority and a $.75/hour reduction in pay, and a loss of my job title.

STATEMENT OF INTEREST OF BETTY RIGGS

I had several jobs prior to working in a chemical plant, but the salary and benefits in those earlier jobs were not as

good. When I heard that the chemical plant was hiring women, I applied immediately.

My son was eight years old when I began working in the plant. At the time my marriage was going very badly and I did not want another child until our relationship improved.

After the company introduced the policy barring fertile women from working in all areas but two, and then several months later just in the high lead areas, the women held several meetings with management. I believe that management pushed sterilization because they made it clear in the meetings that the only form of birth control they considered safe was sterilization. I had asked in one of our meetings whether my husband's vasectomy was adequate protection against my becoming pregnant and was told that it was not.

According to the company's representative, I could still fool around and get pregnant.

I decided to have the sterilization because I needed to keep my job. Management had said that when possible we would be transferred to a safe lead-free department in the factory, but those jobs paid less than what I was currently earning. Besides, I didn't think there were enough jobs available in non-lead departments for all the women, and so I thought there was also the chance that I could be laid off. I don't think I would have been able to manage financially without the higher paying job. By the time the policy was introduced, I knew that my husband and I were going to separate, and that I would have to support myself and my son. In addition, I had always helped my parents who were elderly and infirm and if

I had lost my job I would have had to reduce the amount of my support or even discontinue it altogether.

I was 26 years old when I was sterilized and the realization of what I had done didn't hit me until two or three weeks after the operation. Generally I'd say that I felt less a woman because of the operation. I think that though my marriage was in bad shape, my sterilization made things even worse. My husband was cold, distant and unfeeling about me personally. He just cared about the money I was bringing home. The consequences of the sterilization have even affected my second marriage. Both my second husband and I would have very much liked to have had a child together. In fact I tried to have the operation reversed, but was not successful.

At the plant those of us who had been sterilized were often harassed. In fact I think the harassment became worse after the policy was introduced and it became especially cruel after some of us were sterilized. I overhead four men talking about my operation and they said that I "could have had the surgery done in the carpenter shop," and another supervisor told me "that anybody can screw you now." In addition men called the women "whores" and wrote signs that said for example, "save a job, shoot a woman".

I also think the policy created some friction in the town where the factory was located. Even twelve years after the policy and being laid-off for eight years, I still feel uncomfortable when I attend social activities where I might meet some of my former co-workers, and there are co-

workers or wives of co-workers who refuse to speak to me when we meet.

Statement of Interest of Unnamed
Amici Curiae

STATEMENT OF INTEREST OF JANE DOE 1

As soon as I heard that the chemical plant was hiring women, I applied for a job. A few years after I started working, the company introduced the policy barring women from working in certain high lead jobs. I was not in a department where women were barred from working. But we were led to believe that sometime in the future women might be barred from working in all other departments where there were chemicals.

During that time I was always worried about whether my job was safe. I still had payments on my mobile home which I wouldn't have been able to make if I lost my job. Generally, there was no way I could plan

for a future with the policy hanging over my head. I live alone and support myself. After the policy was introduced, the harassment against women in the plant became much worse. Many of the men and supervisors made us feel as though we were less than an animal. When a woman could overhear them, they referred to the sterilizations as "going to the vets."

STATEMENT OF INTEREST OF JANE DOE 2

I have worked since I was sixteen years old and held a variety of jobs as a waitress, nurses aide and in a factory. These jobs paid low wages and had limited benefits. I heard from friends that an automobile plant was hiring women, and I was hired in the late summer of 1976. I worked in a high lead area of the foundry. At that time, though no one mentioned that the lead levels were particularly high or

that there was any danger. Because of the policy I had to move to another job. It made no difference that my husband had a vasectomy. This job paid less money than the one in the foundry and I had to work overtime to make up the difference. However, it was a hassle having to keep track of when my overtime came up and how many hours were worked. It was made very clear to me that the only way I could go back and work in the foundry was by getting sterilized.

I was laid off for a few months because of a general slow down in the plant, and I returned to a low lead area in the foundry.

The economic situation in this part of the state is not good. There is only one other factory that perhaps offers comparable benefits, but the pay scale is

lower. Some smaller factories have shut down and the others are not hiring. If I lost my job I would either have to travel at least an hour or more round trip to another city or state, or I would have to take a job as a sales clerk or waitress.

STATEMENT OF INTEREST OF JANE DOE 3

I am legally separated and have three children, and receive no child support. A few years ago, I was laid off during the slow season from my job in a paper factory, and a couple of months later when I was supposed to return to work, the company refused to hire me back because I was pregnant.

When I was called back after the layoff, I checked with personnel to make sure about the day I was to return to work. Later that same day, someone from the office called me and told me not to return

to work because I was pregnant. I was told that my job operating the envelope machine was dangerous to my pregnancy because I would be standing for too long. After some time had passed, the company changed their reason and said that in operating the envelope machine I had to stretch a lot and the company believed that would be a strain on me physically. Finally, they told me that the chemicals in the ink printed on the paper were dangerous to my baby.

The job at the paper factory which makes paper products and "novelty" items was the best I ever had. Both the salary and the benefits were better than any I had received on my previous jobs. Before I was laid off I had learned to operate five or six of the seven available machines, and had received a $1.50/hour raise.

When I began earning more money, I took out a personal loan to help me get ahead on some of my other bills. I was still making payments on this loan when I was not rehired, and until I paid up the loan I was very worried that I would fall behind in my loan payments. At this point, I have used all of my unemployment insurance. The factory also discontinued my insurance coverage when I was not rehired. Since March of 1989, I have had no income and no insurance and am currently receiving AFDC.

STATEMENT OF INTEREST OF JANE DOE 4

After I graduated from high school I worked part-time in a restaurant while I looked for full-time employment. I am married and have two children. In 1988 I went to a chemical plant to fill out applications for employment. I was told by

the personnel secretary that before I could complete an application I would first have to sign a statement that either I had been sterilized or was past menopause. Since I was unable to sign, I could not apply for a job.

In September, I was called by the union president and told that the factory had changed its policy and that I should reapply. This time I was given an application which included a statement to the effect that I knew about the dangers of lead and if I became pregnant while working at the factory and anything was wrong with the child I would not sue the company. Even though I disliked signing the statement, I did so because I needed the job. But even though I signed, I never heard from them.

This particular company is the highest paying factory in the general area where I live. It pays about three times more than any other place around here.

STATEMENT OF INTEREST OF JANE DOE 5

After I moved back to Iowa I applied for work at every factory in my area. One of those companies was a chemical plant, which I know offers the highest hourly wage of any employer in this area. I was not given an application at the personnel office because I was first asked to sign a form stating that I was unable to have children. I told them that I had children and was not planning to have any more, but was told that didn't matter. I would still have to sign and provide proof. I think whether or not I can have or even plan to have children in the future is a private matter. It isn't something the company

should have to know before they decide whether or not to hire me. I refused to sign.

Later in the year I was contacted by the president of the union at the factory and told that things had changed and I could now apply for work. Although this time I was not asked to sign a separate form, the application included a statement similar to the first one. I completed the application but did not sign the statement. It is now over a year since I applied for a job, but the company has never contacted me.

STATEMENT OF INTEREST OF JOHN DOE 1

I have worked in the automotive industry for twenty-five years, first in New York, and now in the midwest. During most of those years I worked in the core department where I am exposed to

formaldehyde and other solvents. I am concerned about the exposure to toxic substances because of my personal situation. Only three of my five children are alive. The second child was stillborn. My third child developed cancer early in life and died at age five, and the fourth pregnancy produced twins who were prematurely born. I am convinced that my exposure to hazardous substances in the workplace was the cause of the two deaths and possibly the premature births of the twins.

A lot of men have a hard time relating their chemical exposures to their own health problems or those of their children. Men just assume that during a pregnancy the health of the baby can only be affected by something the mother is exposed to. I also think for economic reasons this issue is a

hard one for many people to take a stand on. The plant where I work isn't hiring any new workers, and all of the men here have ten, fifteen or more years seniority. Some people are afraid that if there is too much pressure put on the company to clean-up the workplace, then the plant will close down. This is what happened in the New York plant where I worked. I have twenty-five years with this company and if this plant was shut down, I know that there is no factory in this area where I could even earn a third of my current salary. You might say that we're sort of caught between a rock and a hard place. Some men prefer to ignore the health issue and just gamble that they or their children won't get sick.

STATEMENT OF INTEREST OF JANE DOE 6

I quit high school in the 10th grade, but returned eleven years later and

received my graduation equivalency diploma. After I quit school, I worked for five years as a sales clerk in a variety store. My salary was minimum wage and I received no benefits other than hospitalization. My next job was in a textile factory, but after a while it closed. A year later I heard that they were hiring women at a plant. I applied for the job because it offered a much better salary ($4.25/hour) and better benefits than any of the jobs I had ever had before. Even though the work was strenuous, I enjoyed it. The money and benefits were excellent. A few years after I started, the women were told that management had decided to prohibit all women capable of having children from working in departments where there were dangerous chemicals. Around this time this policy was introduced, I had to have a

total hysterectomy for medical reasons. Other women at the factory were sterilized so that they could keep their jobs. When we went back to our jobs those of us who had been sterilized, no matter what the reason, were recognized by everyone in the plant. The men in the plant knew about the policy and they knew I was sterilized. Some of them harassed me, making jokes and cruel comments. For example, shortly after I returned to work, someone put a can in my locker with the message "you didn't have to have it done in the hospital, you could have had it done in the maintenance shop." Some of the men referred to me as "one of the guys." I was so upset by this harassment that my doctor put me on medication for my nerves.

Eventually those of us who had been sterilized were recognized in town. There

were times when I walked into a store where there were other customers and someone would loudly say here comes "one of them women."

STATEMENT OF JANE DOE 7

After six years in low paying jobs, I was hired in the stockroom at a chemical company. The salary and benefits were much better than those I had received before.

I worked at the company for more than a year before I became pregnant. When my supervisor learned that I was pregnant, she told me that I would have to stop working. Because I complained about this policy, I was eventually told that I should get a doctor's authorization to continue working. My doctor said that there was no harm in my working because I was not directly exposed to any dangerous chemicals. However even with my doctor's authorization, I was laid

off without any explanation. Although I collected unemployment insurance during my layoff, I had to pay for my insurance coverage with my employer. Because my insurance was better than my husband's, we decided to continue my policy, but it was financially a burden. During this time I looked for other work but found only occasional jobs, through a temp agency. I was never able to get my old job back after my baby was born, even though I tried.

These last six months have been hard for us. We are fortunate that my husband's parents can help us financially from time to time because we cannot make ends meet every month.

STATEMENT OF JOHN DOE 2

I have worked in an automobile plant for several years, and for most of that time I worked in the foundry. In the early

seventies, everyone working in the high lead areas was supposed to have periodic blood tests to determine lead levels. It seems that this requirement wasn't enforced for the men. I know I never had the test.

I was pouring iron when the company introduced its policy requiring all women who worked in high lead areas and whose blood tests showed high lead to transfer to low or lead free areas or to be sterilized if they were still of childbearing age. I supported those women who objected to the policy. I thought that the women I worked with were as capable at their jobs as any man, and I don't think it was right that they were being discriminated against. My impression is that a lot of men felt the same way.

STATEMENT OF JANE DOE 8

In 1973, I began working in the foundry of an automobile plant. At the time, I had one small child and when my husband and I separated I needed to find a job with a good salary and benefits. The plant was the only place in the area that offered both and I was hired into the foundry.

In 1973 no one was concerned about exposure to lead. However a few years later, after I had been transferred out of the foundry and to a department where there wasn't any lead, I heard that some of the women in the foundry had been sterilized so that they could keep their jobs. When I was sent back to the foundry, I had to have a blood lead test every three months, and at almost every test the nurse suggested that I have a tubal ligation. I thought

the surgery wasn't necessary because my second husband had a vasectomy. But I was told that it didn't matter whether or not my husband was sterilized. My blood lead levels remained normal so I never had to leave the foundry. I stayed in there for a few years until I had enough seniority to transfer to another department.

The job situation where I live is not good. If I lost my job I would never find anything comparable to what I now have. A woman who is in her late thirties as I am would probably only be able to get a job as a sales clerk in the shopping mall or as a waitress in a fast-food restaurant.

STATEMENT OF INTEREST OF JANE DOE 9

My first industrial job was in a garment factory doing piece work. I left there because the wages and benefits were bad and I found another industrial job in a

chemical plant. After five years I was laid off, and it took me eighteen months to find another full-time job. But the chemical company I worked for is the largest industry in my area and pays the best wages, and when I learned that they were hiring new people, I returned there as soon as I could.

I worked in the mixed cast area, mixing rocket propellant. I continued in this department until I became pregnant. i think this plant discriminates against pregnant women. I know of women who were pregnant while working at the plant and the company seems to punish us for being pregnant. One woman who just had a baby was due for promotion and was by-passed. They told her it was because she had been pregnant.

I am now pregnant and am especially worried that when I return from maternity leave, I won't have my old job back. I know that they hired someone else for my position one week after I was transferred to the janitor pool.

I am the major supporter of my family. My husband is presently laid off from his job. My family depends on my salary and benefits, and it would be disastrous for us if I lost my job before my husband is called back to work.

STATEMENT OF JANE DOE 10

I started working in the foundry of an automobile plant in 1972. At that time I was married and had two small children.

After I had worked there for about a year, management introduced a policy requiring all women working in high lead areas to have blood lead level tests every

three months. My blood lead level was always low. However the general foreman in the department wanted to get rid of all the women. Those of us who were not sterilized had to wear respirators. I found the respirators very uncomfortable. It's already hot in the foundry and the respirator just makes you hotter. In addition, I couldn't find one that fit me right. The general foreman kept after the women to get sterilized and finally I just decided to have the operation. Looking back, I regret that I did it. I come from a big family and I always wanted more children. At the time I wasn't planning on getting married again and I really needed my job to support the children I already had. But as things happened, I did remarry and both my husband and I wanted a child.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

—v.—

JOHNSON CONTROLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS BY AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICAN NURSES ASSOCIATION; AMERICAN SOCIETY OF LAW AND MEDICINE; ASSOCIATION FOR WOMEN IN SCIENCE; DEPARTMENT OF PUBLIC HEALTH, COMMONWEALTH OF MASSACHUSETTS; ENVIRONMENTAL DEFENSE FUND; EXECUTIVE OFFICE OF LABOR, COMMONWEALTH OF MASSACHUSETTS; OCCUPATIONAL AND ENVIRONMENTAL REPRODUCTIVE HAZARDS CLINIC AND EDUCATION CENTER; SOCIETY OF AMERICAN LAW TEACHERS; TOXICS USE REDUCTION INSTITUTE; NICHOLAS A. ASHFORD, J.D., PH.D.; DAVID BELLINGER, PH.D.; EULA BINGHAM, M.D.; VILMA R. HUNT, B.D.S.; SUSAN KLITZMAN, DR. P.H.; PHILIP J. LANDRIGAN, M.D.; MARC ALAN LAPPE, PH.D.; MARVIN S. LEGATOR, M.D.; DONALD R. MATTISON, M.D.; DAVID MICHAELS, PH.D., M.P.H.; HERBERT L. NEEDLEMAN, M.D.; ANTHONY ROBBINS, M.D.; JOHN F. ROSEN, M.D.; JEANNE STELLMAN, PH.D.; and DIRECTORS OF OCCUPATIONAL MEDICINE PROGRAMS (EDDY BRESNITZ, M.D.; MARK R. CULLEN, M.D.; STEVE HESSL, M.D.; PHILIP J. LANDRIGAN, M.D.; LINDA ROSENSTOCK, M.D.; LAURA WELSH, M.D.)

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INTEREST OF AMICI CURIAE

This brief amici curiae is filed in support of Petitioners pursuant to Rule 37.3 of the Rules of this Court.[1/]

Amici are individuals and organizations concerned primarily with the medical and public health implications of the policy adopted by Johnson Controls. that excludes fertile women from employment opportunities. Amici do not believe that there is a sound scientific basis to focus attention only on women workers, because all workers face significant health risks from occupational exposures such as those at Johnson Controls. This kind of policy disserves overall promotion of workplace safety and health, as well as the health of

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1/ The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 37.3 of the Rules of this Court.

women and children, who lose income and benefits that are essential to their health and well-being.

Some amici have published or participated in scientific research cited by Johnson Controls in support of its policy. They seek to appear as amici to clarify the nature of their research or other activities and to comment on its use by Johnson Controls and its witnesses. Amici believe that their participation in this appeal will aid the Court in evaluating the scientific legitimacy of Johnson Controls' policy and in appreciating its larger implications for nationwide public health policy.

Individual Statements of Interest for Amici Curiae are set out in an Appendix to this brief.

SUMMARY OF ARGUMENT

Introduction

This case revisits familiar terrain. Once again, women's biological role as childbearer is advanced as a rationale for discrimination that would deny women lucrative employment or, in a modern twist, require them to be sterilized to qualify for full employment rights. Johnson Controls' policy, sweeping in scope and virtually unlimited in its implications,[2/]

2/ The policy excludes all women who cannot prove they are incapable of bearing children from all jobs in which any employee has recorded a blood lead level of 30 ug/dl during the preceding year, or in which the job site yielded an air lead sample in excess of 30 ug/m3 during the preceding year, or in which the line of progression would lead to such a job. International Union, UAW v. Johnson Controls, Appendix to the Petition for Certiorari (hereinafter "Pet. App.") at 5a-6a and 97a (Easterbrook, dissenting). Fertile women applicants are also excluded from all jobs as a result of the policy. Johnson Controls v. California Fair Employment & Housing Commission, 218 Cal.App. 3d 517 (1990).

(Blood lead levels are expressed herein as

(continued...)

treats all women as "childbearing vessels," and assumes that children will be better off if women do not work -- at least not in their battery plants. Women workers, however, are not always pregnant, the risks of employment are not confined to them, and employment brings them and their families concrete benefits. This case thus raises critical and timeless questions about who should assess, manage and balance the risks of everyday life, and whether that process should be different for women and men.

In the past, exclusion of women from hazardous employment was justified to protect the "future well-being of the race," Muller v. Oregon, 208 U.S. 412, 422

2/ (...continued)
micrograms (of lead) per deciliter (of blood) (ug/dl) which corresponds closely to micrograms per 100 grams (ug/100g) and micrograms per 100 milliliters (ug/100ml); air lead levels are expressed as micrograms per cubic meter (ug/m^3).

(1908). In an era in which workplace protection for both sexes was foreclosed,3/ the attainment of "half a loaf" of workplace protection may have seemed appropriate. This "protection" was to prove doubly inadequate, however, as women lost economically and men remained subjected to harsh working conditions.4/

The Fair Labor Standards Act, 29 U.S.C. §201, et seq., reflected legislative recognition that all workers required protection from onerous working conditions. Similarly, the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §651, et

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3/ In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court refused to permit such limits on the "right of contract." Muller, however, permitted state-imposed limits on the employer-employee relationship, based on the special biological vulnerability of women and the need to safeguard the "future well-being of the race."

4/ See generally, A. Kessler-Harris, Out to Work, (1982); J. Baer, The Chains of Protection (1978).

seq., recognized the vulnerability of both sexes to work-related health risks, and the need to establish exposure limits and workplace standards that would insure, "to the extent feasible" that "every working man and woman" would enjoy a "safe and healthful" workplace. 29 U.S.C. §651(b) (emphasis added).

Notwithstanding this evolutionary process, Johnson Controls' position differs little from that taken by the advocates and defenders of protective labor legislation. Johnson asserts that women must be involuntarily excluded from such jobs essentially to protect "the future well-being of the race." This position has been rejected on the merits by federal health authorities, as discussed infra. Moreover, in Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e, et

seq., Congress determined that, even if women do require a greater level of workplace health protection, they are still entitled to equal opportunity in employment.

* * *

The legal issues presented by this case are relatively straightforward. Title VII prohibits this historically-familiar effort to limit the rights and daily activities of women in the name of future generations, and it was plainly the intent of Congress to prevent women from being subjected to continued economic disadvantage because they are or might be pregnant. See Point I, infra.

The failure of the court below to enforce Title VII enmeshed it in a dispute over the scientific validity of a discriminatory policy. Title VII

litigation was never intended to be the forum for such disputes: Congress has decided that discrimination is contrary to public policy and that workplace safety standards are appropriately established by federal regulatory authorities operating on the assumption that both men and women will be working.

As this case demonstrates, the inevitable result of establishing workplace health rules as an accidental by-product of discrimination litigation would be to undermine the work of health and safety officials charged with assessing and regulating workplace hazards. Resolving these issues in the regulatory forum intended by Congress, in contrast, would facilitate comprehensive risk management that would consider the risks of employment, the overall benefits and

detriments of various policy alternatives, and all technologically feasible options for reducing risks. See Point II, infra.

ARGUMENT

I. Title VII Litigation Is Not The Appropriate Forum For Addressing Workplace Safety And Health Concerns Which Are Addressed Under Other Federal Laws.

Sex discrimination, like race discrimination, is a recognized economic evil, contributing materially to the depressed economic status of women and the families who depend on them. In recognition of this fact, Congress enacted Title VII and subsequently amended it[5/]

5/ The Pregnancy Discrimination Act ("PDA"), Pub. L. 95-555, 42 U.S.C. §2000e(k), provides that sex discrimination includes discrimination on the basis of "pregnancy, childbirth or related medical conditions; and [that] women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes...as other persons not so affected but similar in their ability or inability to work."

to clarify that the statute prohibits "discrimination [against working women] on the basis of their childbearing capacity [and that it does so] for all employment related purposes."6/

Denial of employment opportunity in the name of health protection (for the fetus) was a familiar rationale for denying women employment opportunities, and it was raised in the legislative debates over the PDA. The Chamber of Commerce opposed the PDA on the ground, inter alia, that it "would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child.... [I]njury to the fetus might give

6/ Committee on Labor and Human Resources, U.S. Senate, 9th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (1979) (hereinafter "Legis. Hist.") at 61, 63.

the child a cause of action against the employer...."7/ Senator Hatch pursued the issue:

> Senator Hatch. Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?
>
> Dr. Hellegers. . . .[Hazardous] agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the

7/ Prepared Statement of G. Brockwel Heylin, Labor Relations Attorney, Chamber of Commerce of the United States. Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 482 (1977); Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 84 (1977).

effects on fetuses, all three, and we aren't doing much of that.[8]

As the exchange suggests, where protection is necessary, it is required for both sexes. That was, in any event, the plain legislative commitment expressed in the PDA; the standard governing employment of women "affected by pregnancy, childbirth, or related medical conditions" is "ability or inability to work."[9]

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[8] Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm., on Human Resources, 95th Cong., 1st Sess. 67 (1977) (Testimony of Andre E. Hellegers, M.D.).

[9] An employee's sex can be taken into account only if sex is a "bona fide occupational qualification" or "BFOQ." 42 U.S.C. §2000e-2(e)(1). Dothard v. Rawlinson, 433 U.S. 321 (1977), and see Western Air Lines v. Criswell, 472 U.S. 400 (1985) (age discrimination case). Both the PDA and the BFOQ provision reflect Congressional intent to establish "ability to work" as the criterion in securing women's employment rights. Any uncertainty in this regard has been clarified by the PDA's specific designation of "ability or inability to work" as the correct

(continued...)

Congress endorsed non-discrimination for women workers and rejected the proposition that women can be denied employment opportunities to "protect" them from potentially hazardous employment. This is not surprising, given the fact that it had recently secured the right of "every working man and woman" to a "safe and healthful" workplace. 29 U.S.C. §651

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[9] (...continued)
standard.

The statute provides no other defense to facial sex or pregnancy discrimination, Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), and the defendant bears the burden of proof as to the affirmative defense. Dothard v. Rawlinson, 433 U.S. 321 (1977). Cf. Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775, 1789 (1989) (plurality opinion), id. at 1805 (O'Connor, J., concurring), and id. at 1811 (Kennedy, J., dissenting); and Trans World Airlines v. Thurston, 469 U.S. 111 (1985). Congress explicitly rejected a cost-based defense: "...even a very high cost could not justify continuation of the policy of discrimination..." Legis. Hist. at 48. And see Manhart, 435 U.S. 702, and Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

(b)(1). The OSH Act requires employers to maintain a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm," §654(a)(1), and it requires the Secretary of Labor to promulgate health and safety standards that assure, to the extent feasible, "that no employee will suffer material impairment of health or functional capacity." §655(b)(5).10/ Congress

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10/ [OSHA] has statutory authority to protect the fetuses of lead-exposed working mothers.... Harm to fetuses, as OSHA contends, is a material impairment of the reproductive systems of the parents.

United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C.Cir.1980), cert. denied, 453 U.S. 913 (1981). And see id. at 1238 n.74.

OSHA has regulated occupational exposures to two substances other than lead in whole or in part because of their reproductive effects. They are dibromochloropropane ("DBCP") and ethylene oxide ("EtO"). U.S. Congress, Office of Technology Assessment, Reproductive Health Hazards in the Workplace, 199-203 (1985).

therefore had good reason, in 1978, to assume that the workplace would be safe for working women, pregnant or not, and that questions about how to accomplish this result would be addressed through the regulatory mechanisms that had been established to research and control work-related hazards.11/

An exception to the non-discrimination principle to protect the health of any group of workers was thus unwarranted. Indeed, OSHA was required to protect workers even in the face of scientific uncertainty by relying on the "best available evidence," 29 U.S.C. §655(b)(5),

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11/ The National Institute for Occupational Safety and Health ("NIOSH") was established as the research authority, 29 U.S.C. §671, and OSHA was set up in the Department of Labor as the regulatory agency. 29 C.F.R. §1910.4 (1989).

and was not to "be paralyzed by debate surrounding diverse medical opinion."12/

Title VII litigation was thus never intended to be a forum for addressing occupational health and safety issues or for identifying groups of workers who may require additional protection from occupational hazards.13/ The lower court's misguided attempts to do so led to a gross distortion of the science of risk assessment and risk management and ultimately produced not only bad law but bad public health as well.

12/ Senate Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 848 (1971), cited in Latin, Good Science, Bad Regulation and Toxic Risk Assessment, 5 Yale J. on Reg. 89, 135 and n.226 (1988).

13/ For a discussion of the implications of the theory adopted by the court of appeals to racial and ethnic sub-groups, see Brief amicus curiae of the NAACP Legal Defense and Education Fund.

II. The Lower Court's Failure To Enforce Title VII As Written Threatens Serious Injury To The Public Health.

The Court of Appeals' misapplication of Title VII law enmeshed it in a factual dispute over the scientific validity of Johnson Controls' policy. This was plainly unnecessary to resolve the Title VII issues, as noted above. Of equally great significance is the fact that this approach has vast negative implications for protection of worker health, by allowing courts to make determinations about what is "safe" for whole subclasses of the employed population on the basis of private litigation, the focus of which is an entirely different and more limited set of issues and interests.

This concern is more than just speculative. Indeed, it is borne out in this case by the court of appeals'

acceptance of Johnson Controls' contention that its policy is justifiable because fetuses are especially at risk, when federal health regulators have concluded that men, women and fetuses all require the same degree of protection from the hazardous effects of lead exposure.

A. The Court Of Appeals' Ruling Provides Less Protection To Workers Than Federal Regulators Conclude Is Necessary.

1. The Findings of OSHA and EPA

In 1978, OSHA promulgated a Final Standard for Occupational Exposure to Lead.[14/] The agency conducted one of the most comprehensive rulemakings ever undertaken in the occupational health

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14/ 29 C.F.R. §1910.1025 (1989). The Preamble to the Standard appears at 43 Fed. Reg. 52952 (1978) (hereinafter "Preamble") and the Attachments appear at 43 Fed. Reg. 54386 (1978) (hereinafter "Attachments").

context. See 43 Fed.Reg. 52953 (1978). Its findings were exhaustive and were sustained on appeal. United Steelworkers of America v. Marshall, 647 F. 2d 1189.

The position now advanced by Johnson Controls was pressed in that rulemaking by the Lead Industries Association. Industry representatives argued, precisely as Johnson Controls does now, that the fetus is differentially susceptible to injury to lead and that fetal safety can only be assured if women of childbearing age are excluded from employment altogether. OSHA considered the matter at some length:

> No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry.[15/]

OSHA rejected the industry position:

15/ Preamble, supra, n. 14, 43 Fed. Reg. at 52960.

> The record in this rulemaking is clear that male workers may be adversely effected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy.16/

Indeed, OSHA's concern about the reproductive effects of lead is reflected in provisions of the Standard that provide an extra measure of safety for both males and females planning to have children, an

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16/ Id. at 52966. OSHA relied on both human epidemiological evidence and experimental data. See Attachments, supra n. 14 at 54389-96, 54421-24. OSHA found that male exposure can cause "a decrease in sexual drive, impotence, decreased ability to produce healthy sperm, and sterility. Malformed sperm (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur.... Germ cells can be affected by lead and cause genetic damage in the egg or sperm...." 29 C.F.R. § 1910.1025, Appendix C, II(5).

approach more protective than that adopted by Johnson Controls. An "action level of 30 ug/m3....education and training .... [e]nvironmental monitoring, biological monitoring, and [access to] medical records... medical removal protection [and use of a] powered air purifying respirator" were all contemplated as appropriate and feasible techniques to maintain worker blood leads at or below 30 ug to insure greater reproductive safety.17/

17/ Attachments, supra n. 14 at 54423 (1978) and see Preamble, supra n. 14 at 52966. OSHA requires that even if air levels are within the permissible exposure limits, respirators be made available to workers, both males and females, who "intend to have children in the near future, and want to reduce the level of lead in [the] body to minimize adverse reproductive effects." 29 C.F.R. §1910.1025, Appendix B, Employee Standard Summary, §IV (1988). Respirators can effect a reduction of air lead exposure by a factor of 10 to 2000. 29 C.F.R. §1910.1025 (f)(iii)(2), Table II. Respiratory Protection for Lead Aerosols. Medical removal protection is also available to reduce worker lead levels. Id., Appendix B, §IX.

The Lead Industries Association specifically challenged these findings and other aspects of the Standard. United Steelworkers of America v. Marshall, 647 F.2d 1189. The Court of Appeals for the District of Columbia characterized the challenge as "an attack on the scientific accuracy of OSHA's studies," id. at 1257, and noted that OSHA had "abundant support" for its conclusions. Id. The court upheld the "reasonable and conscientious interpretations of the agency." Id. at 1258.18/

18/ Johnson Controls' policy targets 30 ug as the level of unacceptable risk for women. This precisely the level at which OSHA determined in 1978 that both men and women face equivalent risks of reproductive injury. Johnson Controls argues that the fetus is differentially susceptible at lower blood levels, but this argument is irrelevant to its policy, which is set at the 30ug level. Moreover, even this claim is refuted by regulatory findings linking very low lead exposures with life-threatening risks to males. See pp. 24-26, infra.

The court below ignored OSHA's conclusions, stating that the lead standard is outdated. Pet. App. 54a. New developments have indeed confirmed the universal nature of the risks posed by lead at lower levels. The court below addressed some of those new developments, but not all.19/

The EPA has recently reviewed the developments in knowledge about lead's toxic effects in its on-going regulation of the content of lead in fuel. It cited "newly developed information" establishing

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19/ In addition to evidence of cardiovascular risk from lead, recent evidence supports OSHA's conclusions about male reproductive risks. See, e.g., Winder, Reproductive and Chromosomal Effects of Occupational Exposure to Lead In the Male, 3 Repro. Tox. 221 (1989), and Uzych, Teratogenesis and Mutagenesis Associated with Exposure of Human Males to Lead: A Review, 58 Yale J. of Bio. and Med. 9 (1985)(both reviewing the literature).

a relationship between exposure of adult males and cardiovascular disease.20/

EPA has documented cardiovascular risks to men at low blood lead levels in the range of 10 ug/dl or less.21/

20/ Environmental Protection Agency, Regulation of Fuel and Full Additives, Supplemental Notice of Proposed Rulemaking, 50 Fed. Reg. 9400, 9401 (1985).

21/ The EPA based its conclusions about cardiovascular risk on, inter alia, Pirkel, et al., The Relationship Between Blood Lead Levels and Blood Pressure and its Cardiovascular Risk Implications, 121 Am.J. Epid. 246 (1985). The Pirkel study examined data from 20,322 white men between the ages of 40-59. After controlling for all known variables, a statistically significant relationship of blood pressure to blood lead levels was found. There was no evidence of a threshold level below which lead had no effect on blood pressure. The researchers also quantified the impact of a reduction in blood lead levels in adult males from 16.7 ug/dl to 10.5 ug/dl over a ten-year period. The 37% decrease in mean blood levels resulted in a 4.7% decrease in the incidence of fatal and nonfatal myocardial infarction, a 6.7% decrease in the incidence of fatal and nonfatal strokes, and a 5.5% decrease in the incidence in death from all causes. These are conservative predictions. The researchers excluded persons with a history of myocardial infarction or stroke from the study and assumed that lead only affects blood pressure.

Accordingly, it predicted that reduction of lead in gasoline (to 0.1 g/gal.) would result in 5,350 fewer myocardial infarctions; 1,115 fewer strokes; and 5,160 fewer deaths among white males aged 40 to 59 in 1986 alone. Extending the analysis to men of other ages and to nonwhites "would substantially increase these estimates." EPA, Costs and Benefits of Reducing Lead in Gasoline: Final Regulatory Impact Analysis, at V-35 (1985).22/

In sum, the lower court's conclusion that the fetus is vulnerable to injury from lead at workplace levels that are "safe" for adults simply has no support in the

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22/ See also Marcus and Cothern, The Characteristics of an Adverse Effect: Using the Example of Developing a Standard for Lead, 16 Drug Metabolism Rev. 423, 436 (1985-86): "Lead's effect on blood pressure is a long-term effect that produces mortality. Tens of thousands of lives would be saved from premature death if the blood lead levels were decreased...."

public record, and health regulators have plainly concluded that the contrary is true.[23] While some might make a value judgment that fetuses should be protected, even when human beings remain at risk, Title VII makes the decision selectively to protect the fetus in utero a sex-discriminatory act, as noted in Point I, supra, and the OSH Act commands that employers protect the health of both working men and women.[24]

23/ Efforts to control occupational lead exposure have a long and infamous history, despite the well-known toxic effects of the chemical. See e.g., Rosner & Markowitz, 'A Gift of God'?: The Public Health Controversy Over Leaded Gasoline In The 1920s, 75 Am.J.Pub.Health 344 (1985).

24/ While the protection of women includes protection of the fetus if a woman happens to be pregnant, United Steelworkers v. Marshall, 647 F.2d at 1256 n.96, it plainly includes a great deal more than that.

2. Evidence On Which The Lower Court Relied Is Inconsistent With The Findings Of Federal Health Authorities

The contrast between the record created by OSHA and EPA and the record in the court below demonstrates some of the difficulties of setting occupational health rules through private litigation. Here, the employer's sole concern was to win justification for a previously adopted policy, which had resulted in the sterilization of at least one woman worker, Joint Appendix (hereinafter "Jt.App.") at 36, ¶79(f), not to explore the hazards of the workplace and devise rational policy.[25] The limited scope of the inquiry may account for the misleading nature of the evidence on which the court

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25/ If anything, the employer had an incentive to conceal all risks except the one it has, for whatever reason, chosen to recognize.

of appeals relied, lacking its own expertise and unwilling to accept the views of the petitioners' experts.

The company's experts failed to evidence familiarity with the analyses and findings of OSHA and EPA and selectively relied on the data on prenatal effects, taken out of context, as noted in a Commentary by Herbert L. Needleman, M.D., and David Bellinger, Ph.D.,[26/] whose research played a central role in Johnson Controls' defense.[27/] The Commentary

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26/ Needleman and Bellinger, Commentary: Recent Developments, 46 Envtl. Res. 190 (1988). Needleman and Bellinger wrote the commentary "to assure that our research is interpreted fully and accurately and that it be placed in the proper biological and epidemiological context."

27/ Defendant's experts identify Needleman and Bellinger's research as "the Boston study." See Jt. App. 199, ¶6 (Chisolm); Jt.App. 187, ¶8 (Whorton); Jt.App.72, ¶4 (Hammond); Jt.App.158 (Fishburn). "The Boston Study" is described in Needleman, et al., The Relationship Between (continued...)

describes both the nature and limits of this research. The studies detected a number of correlations between umbilical cord blood lead levels and physical and neuropsychological development in children, but they "did not measure paternal exposure and thus cannot rule this out [as] a contributing factor." Id.

Bellinger and Needleman note the significance of recent data demonstrating "an association without apparent threshold between exposure to lead and blood pressure in adult males," and suggest that future research will further confirm the harmful effects of lead at very low levels on male reproductive function. As a result, they

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27/ (...continued)
Prenatal Exposure to Lead and Congenital Anomalies, 251 JAMA 2956 (1984) and Bellinger, et al., Longitudinal Analyses of Prenatal and Postnatal Lead Exposure and Early Cognitive Development, 316 New Eng. J. Med. 1037 (1987).

conclude: "we do not believe that present data provide a sufficient scientific basis for applying different lead exposure standards to male and female workers." Id. at 191. They specifically repudiate any inference that men exposed to low levels of lead, or their offspring, are safe, because such a conclusion "is without logical foundation and insupportable on empirical grounds."[28/] Id.

28/ As Needleman and Bellinger note, conclusions cannot be drawn from an absence of evidence or a relative imbalance in the data on male and female risks. See also Deposition of Michael Silverstein, M.D., Jt. App. 202, 220-24.

Scientific uncertainty compounds the difficulties created by the lower court's misallocation of the burden of proof. See n.9, supra. Even assuming arguendo that the BFOQ defense could be applied in this context, the employer would be required to prove that men are not at risk in order to justify a sex-based policy. Instead, the court of appeals required the victims of proven discrimination also to prove that the employer's acts were unjustifiable, by affirmatively proving the risk to the children of male workers. In the absence of equivalent evidence of risks to men, this showing could not be

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Similarly, Dr. John F. Rosen, an amicus herein, and head of the Centers for Disease Control ("CDC") Childhood Lead Poisoning Prevention Ad Hoc Advisory Committee, which advised the CDC on its Statement Preventing Lead Poisoning in Young Children (1985), also cited by Johnson Controls,[29/] repudiates Johnson Controls' position. He believes that Johnson Controls' reliance on the CDC report is misplaced. The CDC looked only at the devastating effects of lead on children and concluded that all exposures should be reduced. A study focussing on other subgroups in the population, such as

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28/ (...continued)
made. The employer would then be permitted to maintain the discriminatory policy, effectuating the scientifically invalid "negative inference."

29/ See Affidavit of Anthony R. Scialli, M.D., Jt. App. 179-80 ¶4.

males with high blood pressure or otherwise at risk of cardiovascular disease, would undoubtedly render a similar recommendation for that population.30/

In addition to their failure to address the conclusions of OSHA and EPA and their selective citation of the data, Johnson Controls' experts are themselves guilty of inconsistency and contradiction. For example, Dr. Whorton testified that lead does not appear to be of "significant functional harm" to the reproductive system of male workers at the current OSHA standard of "50 micrograms per deciliter of whole blood."31/ However, he failed to

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30/ See Statement of Interest of amicus curiae, John F. Rosen, M.D.

31/ Affidavit of M. Donald Whorton, M.D., Jt. App. 186, ¶¶6-7. This is a misstatement of the OSHA recommended standard for blood lead, which is 40 ug/dl. See Preamble, supra n. 14, at 52963 (B)(1). To achieve this level of protection, OSHA (continued...)

address the significance of subtle male reproductive injury, which he had previously recognized:

> The elevation in risk of spontaneous abortion observed in this combination of a textile working wife and a metallurgical factory husband suggests that there were <u>separate mutagenic effects on the germ cells of husband and wife which resulted in increased spontaneous abortions when they occurred together.</u> A combination of mutagenic effects on spermatogenesis and teratogenic effects on the embryo could also have occurred....32/
>
> These data suggest that two separate factors are acting in a synergistic manner: one on the father and one on the mother.

31/ (...continued) set an air lead level of 50 ug/m3 based on an 8 hour time-weighted average. Id.

32/ M. Donald Whorton, Adverse Reproductive Outcomes: The Occupational Health Issue of the 1980s, 73 Am.J.Pub.Health 15 (1983)(emphasis added) (commenting on Hemminki, et al., Spontaneous Abortion in an Industrialized Community in Finland, 73 Am.J.Pub.Health 32 (1983). Males working in the metallurgical factory were exposed to lead and other toxins).

> Neither was readily apparent (except for one textile factory) unless the occupations of both husband and wife were merged....

Id.

One of defendant's experts testified that fetal exposures to low lead levels result in a "clear decrement" in mental development in the child,[33] although he had co-authored an article that concluded:

> With the lead exposed child, if the environment is rich, if the infant is constitutionally robust, and if proper medical care and educational services are present, then such an infant might compensate for any putative neurological damage due to lead.[34]

33/ Affidavit of Paul B. Hammond, Ph.D., Jt. App. 71-72, ¶¶3-4.

34/ Bornschein, Hammond, Dietrich, et al., The Cincinnati Prospective Study of Low Level Lead Exposure and Its Effects on Child Development: Protocol and Status Report, 38 Envtl. Res. 17 (1985). See also, Dietrich et al., Low Level Fetal Lead Exposure Effect on Neurobehavioral Development in Early Infancy, 80 Pediatrics 721, 729 (1987). (continued...)

Another of Johnson Controls' expert witnesses has written that lead is "one of the most dangerous elements to which we expose workers of both sexes." "The increase in adverse pregnancy outcome associated with lead exposure of the mother or father has been described for decades."[35] A fourth expert testified against EPA proposals to reduce lead in gasoline and in favor of a higher "action level" of blood lead in children.[36]

34/ (...continued) Amici cite this material not in support of its conclusions but solely for purposes of demonstrating credibility problems in the record created in the effort to justify this policy.

35/ Scialli, Sexism in Toxicology, 3 Repro. Tox. 219, 220 (1989)(emphasis added). The author nonetheless concludes that there is an "absolute need to protect the fetus." Id.

36/ This testimony was presented by J.Julian Chisolm, Jr., M.D. on behalf of the International Lead Zinc Research Organization, the research arm (continued...)

The policy adopted by Johnson Controls was stimulated, in large part, by the efforts of Charles Fishburn, M.D. Jt.App.153. And see id. at 157-58 (all women excluded previously). Dr. Fishburn had previously explained the basis for his opinion that fertile women should be excluded from lead-exposed jobs in a letter submitted to OSHA:

> I have taken the position of not assigning fertile females to lead exposures since the beginning of my practice in 1969. Unless the female is biologically sterile she can conceive a pregnancy even with the best methods of birth control....
>
> Even though OSHA and other agencies of the Federal Government believe that we can make working environments safe for all populations, "namely, susceptible groups", it is my opinion that in any occupational exposure, regardless of controls, there is a risk of injury or the development of occupational disease due to accident....
>
> For medical legal reasons, as a knowledgeable physician I must take this position in order to protect the unborn child from the pressures of society. I feel that regardless of the sophistication of man-made laws the physician still must abide by the laws governing the natural environment and the laws of nature.

Occupational safety and Health Admin., Docket H-004 (Lead), Exhibit 236. Notwithstanding the company's attempt in this litigation to characterize the policy as based on newly-developed information, the public record reflects that it was instead founded on Dr. Fishburn's own stereotypical "medical legal opinions," in

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36/ (...continued)
of the Lead Industries Association. The "action level" refers to the blood lead level at which medical effects might be seen. EPA proposed 15 ug/dl; Dr. Chisolm supported 25-30 ug/dl. Dr. Chisholm testified against reduction of lead in gasoline in Regulation of Fuel and Fuel Additives, 1982: Hearings Before the EPA at 696, 713-14; Automotive Lead Emissions, 1971: Hearings Before the Panel on Environmental Science & Technology of the Subcommittee on Environmental Pollution of the Committee on Public Works, 93d Cong., 2d Sess. 34 (1974). See also Christman v. American Cyanamid Co., Civ. Action No. 80-0024 (P) (N.D.W.Va.) Deposition of J. Julian Chisolm, Jr., M.D., Aug. 26, 1983 at 158-73.

disregard of OSHA's views, and in disregard of the published data at that time indicating that lead also affects the offspring of male workers.[37/]

The narrow litigation focus led the employer (and the court) to ignore federal health agencies' findings, to misconstrue evidence, to cite data selectively, and to rely on testimony contradicted in the public record.[38/] The improper grant of summary judgment exaggerated the problem, but did not create it: even a full trial

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37/ A. Hamilton, Lead As a Race Poison, Industrial Poisons In The United States 111, 114 (1925) (lead may "cause injury to the paternal germ cell").

38/ Credibility problems of the sort apparent in this case are not confined to litigation. Individuals have institutional loyalties and personal stakes that color their views. See Note, Trans-Science in Torts, 96 Yale L.J. 428 (1986), Latin, Good Science, Bad Regulation and Toxic Risk Assessment, 5 Yale J. on Reg. 89 (1988). In the regulatory arena, however, individual views are more diluted and counter-balanced because of the expanded scope of the inquiry.

could and should not convert a Title VII case into a forum for addressing occupational health policy.

The case-by-case approach to occupational safety issues would generate conflicting decisions, as has already occurred with regard to Johnson Controls' policy. The California Court of Appeals recently decided that Johnson Controls' refusal to hire a fertile woman, pursuant to the same policy at issue here, violates state law. Johnson Controls v. California Fair Employment & Housing Comm., 218 Cal. App. 3d 517 (1990). That court disagreed with the Seventh Circuit about the scientific validity of the policy, relying heavily on the findings made by OSHA.

Unlike the Seventh Circuit, the California court incorporated the technical

assessments made by OSHA,[39] and did not attempt to replicate an extensive and technical process that poses unacceptable demands on both the litigants and the courts, for which, as this case reveals, they are ill-equipped.

B. The Court Below Ignored Necessary Elements Of Risk Assessment And Risk Management That Are Critical To Protecting All Workers.

Achieving rational workplace health protection requires both "risk assessment" and "risk management," to identify unacceptable risks to health and well-being and to undertake rational steps to reduce

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[39] This is entirely appropriate when the regulatory agency has considered the very issues raised in the lawsuit. Employers are compelled to seek guidance from OSHA to address new occupational health problems, precisely because the statute does not allow employers to exercise discretion in deciding how to cure such problems. See General Electric Co. v. Secretary of Labor, 576 F. 2d 558, 561 (3d Cir.1978).

or eliminate them.[40] The process has been similarly described for many kinds of health risks:

> Risk assessment defines the adverse health consequences of exposure to toxic agents....Risk management combines the risk assessment with the directives of regulatory legislation, together with socioeconomic, technical, political and other considerations, to reach a decision as to whether or how much to controls exposure to the suspected toxic agents.
>
> Risk assessment includes one or more of the following

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[40] Translating scientific assessments into legal or regulatory decisions is a task fraught with many challenges under the best of circumstances. See, e.g., Latin, supra n. 38; Note, supra n. 38; Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Col. Rev.L. 277 (1985). While not trouble-free, the regulatory process offers certain advantages over the case-by-case approach to occupational health. Rulemaking encompasses a much greater range of opinions, which are in turn evaluated by trained scientists. The enabling statute may provide policy directives that are critical in the absence of scientific certainty. For example, the OSH Act specifically instructs the Secretary to promulgate standards on the basis of "the best available evidence," in order to avoid regulatory paralysis. 29 U.S.C. §655 (b)(5).

components: hazard identification, dose-response assessment, exposure assessment, and risk characterization.[41]

Reproductive risk assessment may require certain additional considerations:

> The level of concern for a developmental toxic effect is related to several issues, including the relative toxicity of an agent to the offspring versus the adult animal, and the longterm consequences of findings in the fetus or neonate.[42]

The court of appeals misapprehended the basic approach necessary to evaluate the risks of lead exposure, as evidenced by its disregard for certain critical principles: 1) reliance on experimental

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41/ Environmental Protection Agency, Guidelines for Carcinogenic Risk Assessment (hereinafter, "EPA Cancer Risk Guidelines"), 51 Fed. Reg. 33992, 33993 (1986).

42/ Environmental Protection Agency, Guidelines for the Health Assessment of Suspect Developmental Toxicants (hereinafter, "EPA Developmental Risk Guidelines"), 51 Fed. Reg. 34028, 34033 (1986).

data is essential to identify and quantify risks; 2) evidence of injury to the male reproductive system is highly significant and cannot be disregarded simply because its full significance for pregnancy outcome may not yet be known; and 3) risk management requires consideration of the benefits and detriments of various policy options, all technologically feasible means of reducing or eliminating risks, and policies that will encourage adoption of risk-free alternatives. Because the court below apparently perceived its task as simply resolving a dispute between a group of workers and their employer, and failed to appreciate the ramifications of the ruling for all Johnson Controls' workers and others, this essential inquiry was not even attempted.

1. The Relevance of Experimental Data In Risk Assessment.

As evidenced in virtually all federal regulations dealing with toxic risk assessments, experimental data based on studies of animals are a critical element of the process of risk assessment. Human epidemiological studies

> are inherently capable of detecting only comparatively large increases in the relative risk....Negative results cannot prove the absence of [risk]...[43]

Human epidemiology "can rarely be used to make a causal inference," id. at 33995, and requires assessment after the fact of human injury, which experimental data seeks to predict and avoid. Furthermore, as a practical matter,

> [r]eliable epidemiologic data on long-term human risks cannot exist for recently introduced toxic substances and is rarely available for chemicals in longstanding use. Thus, most attempts to regulate toxic hazards must rely on extrapolation of human risks from animal test data.[44]

The significance of animal data in assessing human reproductive risk has been specifically noted:

> [A]n agent that produces an adverse developmental effect in experimental animal studies is assumed to pose a potential hazards to humans.... This assumption is based on the comparison of data for known human developmental toxicants. In almost all cases, the experimental animal data would have predicted a developmental effect in humans.[45]

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[43] EPA Cancer Risk Guidelines, supra n. 41, 51 Fed. Reg. at 33995-96.

[44] Latin, supra, n. 38 at 103.

[45] Environmental Protection Agency, Proposed Amendments to the Guidelines for the Health Assessment of Suspect Developmental Toxicants (hereinafter, "EPA Proposed Amendments to Developmental Risk Guidelines"), 54 Fed. Reg. 9386, 9390 (1989).

Similarly, in the detection of agents capable of altering genetic material in sperm or ova (mutagens), creating a risk of heritable or transmissible injury to future generations after exposure of either parent, it is "appropriate to rely on data from experimental animal systems...." 46/ This is because "it is difficult to obtain" epidemiologic data: large populations need to be studied over an extensive time period, since some heritable disorders may only be observable after two or more generations. Reliance on experimental data avoids some of these problems and, in addition, is justified because "chemicals causing genetic effects in one species or test system frequently cause similar effects in other species or systems." Id.

46/ Environmental Protection Agency, Guidelines for Mutagenicity Risk Assessment, 51 Fed.Reg. 34006, 34008 (1986).

Animal data is thus particularly important in assessing reproductive risks, since human experimentation is unacceptable. In fact, animal data might have predicted that dibromochloropropane ("DBCP") could cause male sterility,47/ and that thalidomide would cause birth defects.48/ EPA notes:

> Comparisons of human and experimental animal data have been made for a limited number of agents that are human developmental toxicants. In these comparisons, there was almost always qualitative concordance of effects between humans and at least one species tested....

47/ Dep't of Labor, Occupational Safety and Health Admin., Occupational Exposure to 1,2-Dibromo-3-Chloropropane (DBCP), 43 Fed.Reg.11514, 11517 (1978); Environmental Protection Agency, Intent to Cancel Pesticide Products Containing Dibromochloropropane (DBCP), 50 Fed. Reg.1122 (1985) (DBCP also mutagenic and carcinogenic in animals).

48/ EPA Proposed Amendments to Developmental Risk Guidelines, supra n. 45, 54 Fed.Reg. at 9390.

Id. Because of the desire to avoid tragedies like those associated with DBCP and thalidomide,[49] virtually every federal agency charged with the regulation of substances that could have adverse health effects relies on experimental data.[50] Yet the court of appeals discounted

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[49] Evidence of an agent's toxicity ordinarily prompts removal of the toxic agent. For example, DBCP was quickly banned for most uses, and several employers voluntarily suspended its use even before they were required to. See 43 Fed.Reg. 11514-15 (1978)(OSHA) and 50 Fed.Reg.1123-24 (1985)(EPA). Thalidomide was never approved by the FDA, even though it may provide valuable treatment for leprosy and other diseases. Blakeslee, Scorned Thalidomide Researched Anew, New York Times, Apr. 10, 1990, C3. In the occupational context, however, primarily in industries in which women workers are in the minority, evidence of pregnancy related risks, even when accompanied by other risks, has prompted the removal of women workers, not efforts to reduce the hazard. See Paul, et al., Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am.J.Indust.Med. 267 (1989).

[50] See the extensive discussion of animal data in the regulatory context, and court decisions approving reliance on such data, in the brief amicus curiae for the Natural Resources Defense Council.

evidence of risk derived from animal data as "speculative and unconvincing," and not "solid scientific data." Pet.App. 34a.[51] In so finding, the lower court ignored evidence that health regulators and most scientists deem critical in assessing risk.

2. The Significance Of Evidence Of Male Reproductive Dysfunction

The court of appeals discounted evidence of male reproductive injury, reducing it to evidence of "changes in sperm shape." Pet.App. 34a. Even if the record in the case went no further, which it does, such injury would still merit

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[51] Ironically, expert opinion on which the court relied was also based on animal data. See, e.g., Deposition of E.K.Silbergeld, Ph.D., Feb. 18, 1986, at 49-52, specifically cited by the lower court. Pet. App. 15a. Moreover, the UAW relied on more than "just" animal studies. See, for example, Jt. App. 202-22 (Silverstein Deposition). In other contexts, industry representatives have challenged the significance of human data of reproductive risk on methodological grounds. E.g., United Steelworkers v. Marshall, 647 F.2d at 1257-58.

attention and concern in developing workplace health policies.

Male exposures to toxic agents can affect not only a couple's fertility but also the course of pregnancy, pregnancy outcome, and potentially the health of a future child: "The effects of parental exposure before conception to agents toxic to reproductive functions may be evident as reduced fertility, unsuccessful fertilization or implantation, or an abnormal fetus." Centers for Disease Control, Leading Work-Related Diseases and Injuries -- United States, 34 MMWR 537 (1985).52/ This is because

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52/ Toxic substance can affect the normal development of the fetus at three stages of the reproductive process. Gametotoxins are substances which cause defects to the egg or sperm prior to conception, thereby impairing the exposed individual's ability to contribute to the conception of a healthy fetus. Mutagens cause alterations in the chromosomal structure or the DNA (continued...)

> [a]dverse pregnancy outcomes can occur as a result of preconception damage to the germ line of the male or female. Mutagenic damage to the DNA contained in sperm or ova can result in heritable defects leading to embryolethality, congenital malformations, or genetic disease in offspring ....Paternal exposures may be responsible for adverse pregnancy outcomes. Mutagenic insult to developing spermatozoa, for instance, can have adverse consequences both for the male himself and for the fetus.53/

EPA agrees that "adverse effects on the developing organism...may result from exposure prior to conception (either

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52/ (...continued) molecule in the adult male and female reproductive cells or fetal cells, and can be manifested by abnormal fetal development (including birth defects) and genetic defects in later generations. Teratogens are substances that operate directly on the fetus and impair normal growth after conception. Strobino, Klein & Stein, Chemical and Physical Exposures of Parents: Effects on Human Reproduction and Offspring, Early Human Development 371 (1978) at 371-378.

53/ M.E.Paul, Reproductive Fitness and Risk, 3 Occupational Medicine: State of the Art Reviews 323, 328 (1988).

parent)."[54/] The consequences can be severe:

> Mutations carried in germ cells may be inherited by future generations and may contribute to genetic disease....Such genetic abnormalities can lead to structural or functional health impairments. These conditions may be expressed _in utero_; at the time of birth; or during infancy, childhood, adolescence, or adult life; they may be chronic or acute in nature.[55/]

Evidence that an agent causes alterations in sperm shape is particularly important,

> [b]ecause of the observed correlation between an agent's mutagenicity and its ability to induce abnormal sperm forms....An increase in abnormal sperm morphology has been considered supportive evidence that the agent has gained access to the germ cells. Exposure of males to toxic agents may lead to sperm abnormalities in their progeny. However, transmissible germ-cell mutations could exist in the absence of any warning indicator....[56/]

Sperm studies may act as a kind of early warning system for reproductive risk. EPA has recognized the "unique vulnerability of the male reproductive system since toxic agents, acting through a variety of direct and indirect pathways, can evoke adverse responses."[57/] Indeed, NIOSH recommends studies of semen quality to "help identify workplaces where some types of hazards to reproduction exist, preferably before irreversible testicular

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[54/] EPA Developmental Risk Guidelines, _supra_ n. 42, 51 Fed.Reg. at 34030.

[55/] EPA Guidelines for Mutagenicity Risk Assessment, 51 Fed.Reg. at 34007 (1986). _See also_ EPA Proposed Amendments to Developmental Risk Guidelines, _supra_ n. 45, 54 Fed.Reg. at 9390.

[56/] Environmental Protection Agency, Proposed Guidelines for Assessing Male Reproductive Risk, 53 Fed.Reg. 24850, 24858-59 (1988)(references omitted).

[57/] _Id._ at 24852.

damage or other profound disorders of reproduction occur."[58/]

Numerous studies suggest a correlation between preconception paternal occupational exposures and illness or injury in later born children. Most recently, childhood cancer has been traced to fathers' preconception occupational radiation exposure.[59/] Effects on offspring of male lead workers have long been reported.[60/] Given that approximately 70% of all birth defects are of unknown origin,[61/] any rational attempt to address reproductive health could not ignore evidence of injury to sperm.

3. Risk Management Is Essential To Rational Occupational Health Policy.

[58/] Ass'n of Schools of Public Health and National Institute for Occupational Safety and Health, Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries, Part 2, at 8 (1988). This document notes that "[a]ll undisputed episodes of occupational disorders of reproduction in the recent past have involved male workers." Id.

[59/] M.J. Gardner, et al., Results of Case-Control Study of Leukaemia and Lymphoma Among Young People Near Selafield Nuclear Plant in West Cumbria, 300 Br. Med. J. 423 (1990). See also Daniell & Vaughan, Paternal Occupation and Brain Cancer in Offspring: A Mortality-Based Case-Control Study, 14 Am.J. Ind. Med. 299 (1988); Cassidy, et al., Occupational Hydrocarbon Exposure Among Fathers of Prader Willi Syndrome Patients With and Without Deletions of 15q, 44 Am. J. Hum. Genetics 806 (1989); Olshan, et al., Paternal (continued...)

[59/] (...continued) Occupational Exposures and the Risk of Down Syndrome 44 Am.J.Hum. Genetics 646 (1989). Savitz, "Childhood Cancer," Occupational Medicine State of the Art Reviews: Reproductive Problems in the Workplace (Z. Stein & M. Hatch, eds.) 415 (1986) (reviewing literature). And see Jt.App. 202-22 (Silverstein Deposition).

[60/] Hamilton, supra n. 37, at 111, 114 ("lead poisoning in the father affects the offspring disastrously,...[n]ervous disorders' [were most pronounced] if both parents were leaded," and lead causes "injury to the paternal germ cell.") There is no evidence that this effect has a threshold below which effects do not occur. Jt.App.228 (Silbergeld Deposition).

[61/] EPA Developmental Risk Guidelines, supra n. 42 at 34028.

As a general proposition, private litigation focussing on a specific risk or dispute may fail to advance, and may even undermine, overall health policy by failing to undertake a sufficiently comprehensive analysis.

> Litigation is almost certain to ignore the difficult half of the excess risk calculation, dismissing it as too speculative to be worth the effort. Nevertheless, if prudent risk management is the ultimate objective, we cannot conduct only one half of the risk calculation.[62]

Johnson Controls' policy creates additional risks for women workers as well as their current and future children. Unemployment, under-employment, and the resulting poverty occasioned by the denial of desirable employment to women workers can have disastrous effects on children and

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62/ Huber, supra n. 40 at 326.

the health of pregnant workers, as Congress specifically recognized in its deliberations about the importance of full employment opportunities for women.[63] In Title VII, Congress struck the balance so as to recognize these considerations, and to allow women to make employment-related risk determinations for themselves. Thus, the difficult half of the excess risk calculation, supra p. 56, has already been addressed, a fact the lower court failed to appreciate.

Even if Title VII did not mandate this result, rational health policy would

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63/ Industrial employment is particularly important for unskilled and uneducated women, for whom few other employment opportunities are available at decent wages. In addition to loss of income, women may lose insurance benefits and suffer in their nutrition, housing, and general level of well-being, if they are denied this type of employment. These effects are documented in the Brief amici curiae, of the American Civil Liberties Union, et al.

require consideration of these risks as well as alternatives to the policy at issue, including industrial hygiene technology that is available to reduce risk. The decision below would permit decisions based on specific evidence of implementation costs. This result rewards the least efficient employers and, discourages innovation in the industry as a whole. Individual employers, may not always be motivated to explore innovative approaches to workplace safety problems, precisely because they are likely to cost something to implement, and may disrupt production.

Regulatory agencies develop policy based on industry-wide cost/benefit and considerations. OSHA is directed to develop "innovative methods, techniques, and approaches for dealing with

occupational safety and health problems," 29 U.S.C. §651(b)(5). The feasibility requirement of the statute is directed to the industry as a whole, and not to individual employers, precisely because the goal is to institutionalize the best technology available, rather than the worst.64/

Regulatory agencies, have access to a broad base of information about technology that is currently available or in development, have the expertise to evaluate its uses, and can assess costs and feasibility for the industry as a whole. The decision below fails to account for specific proposals in the industrial hygiene literature for methods of reducing

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64/ See United Steelworkers of America v. Marshall, 64 F.2d at 1264-66; Asarco, Inc. v. Occupational Safety and Health Admin., 746 F.2d 483, 495-6 (9th Cir. 1984).

lead exposures in battery making facilities. Ventilation, engineering controls, isolation of certain tasks, air plenums, and vacuum systems are among the techniques recommended in standard texts,[65] and more innovative approaches are being explored.[66] Knowledge of all these developments is critical to risk management as well as the feasibility assessment under OSHA.

These principles explain why Johnson Controls is obligated to seek guidance from

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65/ Bullock, "Lead-Acid Battery Manufacturing," in Industrial Hygiene Aspects of Plant Operations 599-633 (Cralley and Cralley, eds.) (1985). Mr. Bullock, corporate industrial hygienist at Johnson Controls, demonstrates the success of a number of these methods in reducing lead levels below 30 ug/dl. Id. at 619.

66/ For example, the Toxic Use Reduction Institute in Massachusetts was established in part to undertake research on substitution of safe substances for hazardous ones. Geiser, Toxics Use Reduction and Pollution Prevention, 1 New Solutions 1 (1990). Other states are considering similar approaches. Id.

OSHA in achieving compliance with the Lead Standard or improving on it. For example, OSHA is undoubtedly aware of the substantial body of scientific evidence on substitutes for lead-acid batteries. For example Nickel-Cadmium (NICAD) batteries are currently used in some situations. Another alternative is the Nickel-Iron (Edison) battery which was used extensively for engine starting in the first automobiles (1910-20) and is currently used as the only means of energy in underground trains used in mining operations. Research and development of this battery as a possible substitute for lead-acid batteries is ongoing.[67]

There is a substantial federal effort to study new battery technology for all

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67/ See generally Perez, The Complete Battery Book (1985).

applications. The Department of Energy has developed an accessible data base of characteristics of batteries which could be used to explore substitutes for the lead-acid battery.[68/] Indeed, research on Zinc-Bromide batteries in Johnson Controls has been sponsored by the federal government for the last 5 years,[69/] a fact that was omitted from the record in this case.

Even if various alternatives and control technologies were not possible, and this type of work could not be made safer, there would still be no basis for "solving" the workplace health problem by arbitrarily

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68/ Burke, et al., "A Battery Data Base for Electric Vehicle Applications" in Proceedings of the 5th Annual Battery Conference on Applications and Advances (1990).

69/ Dodge and Elder (Advance Battery Business Unit, Johnson Controls, Inc.), "Recent Advances in Zinc/Bromide Technology at Johnson Controls Inc." in Proceedings of the 5th Annual Battery Conference on Applications and Advances (1990).

discriminating. This situation would represent the quintessential risk management problem that must be resolved on a national level, by a determination whether the product is essential, whether it should be banned, or whether public funds should be expended to reduce or insure risks if the barrier to safety is cost-based. These decision will depend on as objective an assessment as possible of the precise nature of the risks and the state of technology for reducing them, as well as policy considerations. As this Court has noted, reviewing technical arguments, balancing competing interests, or creating "high policy" "is the business of elected representatives." See, e.g., Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980) (court's function to enforce plain language of federal statute).

Because science can so rarely, if ever, provide definitive answers, Congress wisely established policies in the OSH Act and Title VII to secure non-discrimination in employment and to achieve workplace safety at the most protective level feasible. The dispositive "risk management" decision in this case has thus been made. Deviation from the Congressional choices led the court below to endorse an approach that, for the reasons set out above, would ultimately disserve the public health and the very individuals the policy purports to protect.

CONCLUSION

Wherefore, amici urge the Court to reverse the decision of the Seventh Circuit and remand with instructions to enter judgment for petitioners.

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APPENDIX

Statements of Interest of *Amici Curiae*

The **AMERICAN PUBLIC HEALTH ASSOCIATION**, founded in 1872, is a non-governmental society whose membership, including its state and local affiliates, is comprised of approximately 50,000 health professionals interested in promoting high scientific standards, action programs and public policy for good health. Its reproductive health policy, adopted in 1979, "condemns the corporate practice of forcing women to choose between their jobs and the right to reproduce [and urges governmental agencies to develop] occupational exposure standards that protect women, men, and the fetus."

The **AMERICAN NURSES' ASSOCIATION** is both the professional association for registered nurses and a labor organization.

Through its constituents, ANA represents registered nurses and other health care workers who are at continuous risk of workplace exposure to mutagenic and teratogenic materials. ANA opposes sex-based occupational exclusion policies which fail to mitigate reproductive risks for both sexes and which have a disproportionate economic impact on women.

The **AMERICAN SOCIETY OF LAW & MEDICINE** was founded in 1972 to provide a forum for interdisciplinary discussion of the complex issues at the interface of law, medicine and health. Ongoing informational efforts include the publication of two quarterly journals, Law, Medicine and Health Care, a leading forum for interprofessional analysis of current issues, and the American Journal of Law and Medicine, a law review co-published with the Boston

University School of Law. For the reasons stated in the attached brief, the Society opposes discriminatory policies that undermine public health goals.

The **ASSOCIATION FOR WOMEN IN SCIENCE** (AWIS), a national educational and scientific organization of 3,200 members, works to expand educational and employment opportunities for women in diverse scientific fields. AWIS opposes discrimination in the workplace and has worked to establish greater equity in the labor force. In addition, AWIS opposes the misuse, abuse or inappropriate application of science. AWIS favors the development of workplace standards that establish healthy working conditions for all workers; this includes the development of standards that protect women, men and the fetus.

The **DEPARTMENT OF PUBLIC HEALTH, COMMONWEALTH OF MASSACHUSETTS (DAVID H. MULLIGAN, COMMISSIONER)** was founded one hundred and twenty years ago. It is the oldest state department of health in the United States. The Department is mandated to "take cognizance of the interests of life, health, comfort and convenience among the citizens of the Commonwealth." M.G.C. c. 111 §5. The Department has an interest in protecting the health of its citizens in the workforce and their families. In 1988 the Department published the findings from its survey of Massachusetts employers' reproductive hazards policies and programs -- the only such study that has been conducted in the United States.

The **ENVIRONMENTAL DEFENSE FUND (EDF)** is a non-profit advocacy organization with over 150,000 members nationwide. Since its

founding in 1967, EDF has been involved in efforts to reduce human exposure to environmental toxins, including substances such as lead. EDF has participated extensively in administrative, judicial and legislative proceedings on the control of lead in gasoline, drinking water, incinerator ash, point source emissions, consumer products, and in the workplace. EDF's concerns about lead toxicity extend to male-mediated effects of lead on reproductive function as well as female-mediated reproductive effects and other health effects on adults and children of both sexes.

The **EXECUTIVE OFFICE OF LABOR, COMMONWEALTH OF MASSACHUSETTS (PAUL J. EUSTACE, SECRETARY OF LABOR)** was established to promote and protect the legal, economic, health and safety

interests of Massachusetts workers. Through its Department of Labor and Industries the Secretariat investigates and regulates places of employment to prevent and address workplace health hazards, including reproductive health hazards, in order to protect the health and safety of workers. Massachusetts was one of the first twelve states in the country to realize the importance of workplace health hazards by creating in 1934 a Division of Occupational Hygiene within the Department of Labor and Industries to investigate workplaces and promote health and safety education.

The **OCCUPATIONAL AND ENVIRONMENTAL REPRODUCTIVE HAZARDS CLINIC AND EDUCATION CENTER**, University of Massachusetts Medical Center (Maureen E. Paul, M.D., Director) opened in March of 1988 in response to

growing public and provider concerns about toxic exposures and the special needs of patients faced with potential reproductive health risks. The main objective of the Center is to provide to patients and health care providers accurate and up-to-date information regarding the effects of toxic exposures on the reproductive health of women as well as men, whose reproductive health needs are often ignored. Dr. Paul's publications in the area of reproductive health include: Reproductive Fitness and Risk, 3 Occup. Med. 323 (1988); Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work, and Health Survey, Am. J. of Indust. Med. 267 (1989); Reproductive Hazards in the Workplace: What the Practitioner Needs to Know About Chemical Exposures, Obstetrics & Gynecology 921 (1988).

The **SOCIETY OF AMERICAN LAW TEACHERS** ("**SALT**") is a national organization of over five hundred legal educators at over one hundred law schools. SALT is committed to promoting public service by the legal professions and to advancing justice and protecting human rights. SALT is committed to the goals of Title VII, which include equal employment opportunities for women. SALT is also concerned about workplace safety for all workers and their children. SALT believes that the Court of Appeals for the Seventh Circuit erred in upholding Johnson Control's fetal vulnerability policy. It objects to Johnson Control's policy because it denies employment health of all workers and their children.

TOXICS USE REDUCTION INSTITUTE, UNIVERSITY OF LOWELL, MASSACHUSETTS is a multi-disciplinary research, education and

policy center which will commence formal operations in the fall of 1990. The Institute will sponsor research, conduct training and provide technical support to promote reduction in the use of toxic and hazardous chemicals in industry and commerce.

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that all exposures should be reduced. A study focussing on other subgroups in the population, such as males with high blood pressure or otherwise at risk of cardiovascular disease, would undoubtedly render a similar recommendation for that population. Dr. Rosen's research has demonstrated lead's toxic effects on all segments of the exposed population. Recently, he and others have documented a risk of endogenous lead poisoning in children with pre-existing lead exposures who are immobilized as a result of bone fracture, and this is a result that would be expected to occur in adults as well.

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IN THE
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OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Respondent.

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as domestic social development, fair employ-

ment and anti-discrimination policies, family life, and the rights of the unborn. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of the dignity of work, family life, equal opportunity, and unborn life. These interests are implicated in the instant case.

This case presents novel, sensitive, and complex public policy concerns for the Court. This *amicus* has long supported efforts here and elsewhere to oppose employment discrimination; all persons must have full opportunity to work with safety and dignity. In addition, when unborn lives are threatened with injury, this *amicus* has supported efforts to protect them. Here, some would propose the Court create conclusive presumptions favoring one or the other interest. Some would simply side with the employee and void all efforts to protect the unborn; others might seek to void consideration of women's equal employment interests to protect those who might be conceived. This *amicus* rejects both absolutist approaches. Rather than engage in a discussion about whether and to what extent rights are in conflict, this Court should seek ways that oblige employers to take into account the lives and safety of workers *and* their unborn children. We insist that equal employment opportunity for all individuals cannot come at the expense of threats to their children.

The particular purpose to which this Brief is addressed is limited. Petitioners and their *amici* assert that no corporate policy expressly considering protecting children yet to be born from workplace toxin exposure to their mothers may withstand scrutiny as a bona fide occupational qualification under Title VII of the Civil Rights Act of 1964. Moreover, they imply that such consideration, even if legal, would be unwise social policy. Without compromising any of our traditional policies and

interests, this *amicus* writes only for the limited purpose of showing that such a policy may be not only reasonable but lawful under the Title VII bona fide occupational qualification defense.[1]

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Progress always has a price. Who should pay this price is a question that the greater society and the government constantly face. In the formative years of American industry, unfortunately, it was workers, their families, or the public that bore the risks. As but one example, the tort system required proof of direct cause or privity before the burdens of progress were shifted to industry. In this century, we have come to recognize that that system was unfair and did not adequately distribute the risks and costs that accompanied the not yet understood consequences of an increasingly more complex industrial and technological era. For this reason, government, through legislation or regulation, began first to protect workers, then others, from these risks. As knowledge of these risks increased, American business shouldered more and more of its proper responsibility.

Our products and production systems cause problems that transcend the present—beyond factories and workers to the environment and even, through consequences to the genetic character of workers or through long-lasting

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[1] The court below held that concern for the health and safety of unborn children was also a legitimate and proper concern in evaluating Respondent's business necessity defense. Because of the policy's facially disparate treatment of women workers, this *amicus* assumes that the fetal protection policy is more logically scrutinized under the bona fide occupational qualification defense rather than business necessity which is generally utilized in disparate impact cases. *See amicus curiae* Brief for the United States and the Equal Employment Opportunities Commission.

toxins, to generations yet to be born. Governmental reaction to the demand for increased protection for the public's health and safety has resulted in minimizing, or even prohibiting, toxins and other agents likely to cause great harm. No one asserts, here or elsewhere, that this concern is unwise or improper. This interest is reflected in numerous laws and policies at both the federal and state level which have as a goal the broad protection of the public, including in that "public" those who are yet to be born. Although diverse in source and content, together these laws and policies reflect society's intention that the next generation has the chance to be born in good health. Employers are particularly well-situated to contribute to the realization of this social goal. Their expertise with respect to their products and working conditions, as well as their ability to respond quickly to changing scientific and technological knowledge, makes them necessary contributors to policies ensuring workplace safety.

Against that complex background, this Court must construe Title VII, a remedial statute designed to combat workplace discrimination. Discriminating practices cannot substitute for investment in and effective application of workplace safety measures. In this case, Respondent Johnson Controls recognized that the unalterable presence of lead in its battery making operations created a hazard to children who might be born to its women employees. No one seriously contests that risk. What is contested is Johnson Controls' remedy—the exclusion of women of childbearing capacity from its battery making operations under a "fetal protection policy." In response to a Title VII claim, the company argues, among other things, that this exclusion is a bona fide occupational qualification or "bfoq." Although the articulation and implementation of fetal protection policies involve resolution of difficult and complex public policies involving the dignity and status of women workers, operation of the civil rights statutes, and legal status of the unborn, none of these issues goes

to the core of the statutory question presented. This *amicus* writes solely to explain how and why express consideration of the health and safety of those yet to be born is a valid consideration in construing Title VII and its bfoq defense.

The plain language of the bfoq defense, "reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. § 703(e)(1) (1982), permits employers to consider the health and safety of third parties, including the offspring of their employees, when formulating employment policies. This Court has recognized the need to safeguard persons other than employees as a relevant and legitimate employment goal in Title VII cases. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977), *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), and *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979). That Title VII is a remedial civil rights status is of no moment. Federal handicap discrimination laws permit employers to act based upon concerns about the safety of persons other than employees. Workers posing a direct threat to the safety of others because of an infectious disease or because of current alcohol or drug abuse are not considered to be otherwise qualified to perform the tasks of employment. 29 U.S.C. § 706(8)(B), (C) (1982).

When Congress passed the Pregnancy Discrimination Act, 92 Stat. 2076 (1978) ("PDA"), it did not intend to exclude safety concerns as relevant to the bfoq defense. At the time of passage of the PDA, Congress was well aware that courts permitted employers to consider public safety in Title VII cases. It is unreasonable to presume that Congress would have permitted this socially accepted goal to be discarded *sub silentio*, in the face of its action on numerous other environmental and workplace rules designed to protect broadly the public. Indeed, performance-related considerations permitted employers under the PDA *include* the safety of third parties. The legisla-

tive history of the PDA indicates that Congress intended the bfoq provision to operate as it had prior to the PDA, when third party safety was well-recognized to be relevant to businesses' "normal operation." Properly viewed in this context, the law permits companies whose workplace risks transcend the present workforce to evaluate those risks in setting its policies. Such a result is valid under Title VII and fully comports with broader social demands and trends.

ARGUMENT

I. EMPLOYERS ARE PROPERLY OBLIGED TO PROTECT BROADLY WORKERS AND THE PUBLIC, INCLUDING FUTURE GENERATIONS, FROM SUBSTANTIAL AND FORESEEABLE HARM.

Protecting the unborn (in the context of the instant case) is described as "otherwise laudable" and an "otherwise perfectly legitimate, and indeed [a] praiseworthy, ethical and moral concern[]."[2] Notwithstanding their admission of society's interest in the welfare of the unborn, Petitioners would deny that employers may legitimately be permitted under Title VII to implement a fetal protection policy. Petitioners urge this Court to rule such policies forbidden by Title VII and declare them practically unwise, claiming they will lead to "poor social decisionmaking."[3] That claim ignores a consistent and wise public policy that generally accords great value to protection of the unborn.

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[2] Pet. Brief at 34 and 36. *See also amicus curiae* Brief for the United States and the Equal Employment Opportunities Commission at 16 n.13 (hereinafter, "Brief for the United States"), affirming the social value of fetal protection.

[3] Pet. Brief at 37. Petitioners' former claim is treated in Part II.A and B; the latter is answered here.

A. Law and Policy Demonstrate a Strong Public Interest in Protecting the Health and Safety of the Unborn.

The health and safety of the next generation is a matter of preeminent concern for every generation. American society expresses its concern about the health and welfare of the next generation in a variety of ways.[4] In addition to protective laws, numerous non-coercive public policies and decisions demonstrate the important place accorded the welfare of the unborn. Referencing these various sources, a consistent public policy protecting the health and safety of the next generation emerges.[5] "No one can treat lightly the possibility of injury to future children, who cannot protect themselves or participate in the decisions that will govern their lives." *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990) (No. 89-1215).

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[4] The United States has formally expressed very publicly its commitment to the life and health of unborn children by endorsing the United Nations' Declaration of the Rights of the Child, acknowledging that:

> [T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*

General Assembly of the United Nations, *1959 Declaration of the Rights of the Child*, preamble (adopted Nov. 20, 1959) (emphasis added).

[5] The rulings of this Court constitutionalizing abortion are the main exception to this public policy. Although abortion is not determinative in the present issue, which concerns the permissibility of private employers' considering fetal protection policies under Title VII, it colors arguments that tend to lessen concern for the unborn. This Court has never held that the Constitution requires indifference to the potential for substantial harm to the unborn, but, rather, has found that society has a legitimate interest in protecting unborn life. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3057 (1989); *Harris v. McRae*, 448 U.S. 297, 314 (1980).

The health of the next generation is so significantly affected by parents' total environment, including work life, that public health specialists urge both prospective parents to pay adequate attention to their individual health and safety before conception as a way to give birth to healthy children.[6] The Department of Health and Human Services supports that conclusion:

> In relation to the total life span of the individual, the early developmental years are short and serve as the foundation for the remainder of one's life span. The needs of a child in the support of this growth and development begin *before birth* and continue throughout the growth years until maturity is reached.[7]

For this reason significant amounts of limited available medical resources are devoted to prenatal surgery to promote healthy children even before birth. Sophisticated operations may be performed *in utero*.[8] Substantial re-

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[6] Comm. on Maternal Health Care and Family Planning, Maternal and Child Health Section, American Public Health Association, *Ambulatory Maternal Health Care and Family Planning Services: Policies, Principles, Practices*, 30 (1978).

[7] U.S. Dept. of Health and Human Services, Office of Human Development Services Administration for Children, Youth and Families Research, Demonstration and Evaluation Division, *The Status of Children, Youth and Families 1979*, 30 (DHHS Publication No. (OHDS) 80-30274, Aug. 1980) (emphasis added). The federal government further seeks to protect the unborn through the Department of Health and Human Services' fetal experimentation policies. *See* 45 C.F.R. § 46.208 (1989). Beginning in 1985, Congress explicitly prohibited federal approval of any research that would allow substantial risk to the unborn in the pursuit of important medical knowledge that cannot be obtained by other means. Health Research Extension Act of 1985, Pub. L. No. 99-158, 99th Cong., 1st Sess. § 2 (1985). This applies even to unborn children scheduled for abortion. *See also* L. Wardle, C. Blakesley & J. Parker, *Contemporary Family Law: Principles, Policies, and Practices*, § 6:17 at 93 (1988) (listing states' fetal experimentation policies generally following the federal model).

[8] *See, e.g.*, Harrison, *et al.*, *Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Viscera*

sources have been applied, too, to more common maladies suffered *in utero* resulting in low birth weight and the various effects of poor maternal nutrition.[9]

In recognition of these concerns, states have traditionally extended protection to unborn life by permitting recovery for prenatal injuries:

> The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death.[10]

Recovery is allowed regardless of whether the child was injured before or after viability.[11] Further expanding this policy, a majority of jurisdictions allow recovery

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from the Left Thorax, 322 New Eng. J. Med. 1582 (May 31, 1990); Clewell, *et al.*, *A Surgical Approach to the Treatment of Fetal Hydrocephalus*, 306 New Eng. J. Med. 1320 (June 3, 1982).

[9] Brown, *Can Low Birth Weight be Prevented?*, 17 Family Planning Perspectives 125 (May/June, 1985) (Principal maternal risk factors associated with delivering underweight infants include "toxic exposures, including occupational hazards." Notes that "some experts have suggested that more attention be given to health assessment of women *before* they become pregnant, to identification of risk factors and, where possible, to interventions for reducing them") (emphasis added).

[10] W. Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 55 (5th ed. 1984) (footnotes omitted); *See* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

[11] *See, e.g., Group Health Ass'n v. Blumenthal*, 453 A.2d 1198 (Md. 1984); *Shack v. Holland*, 389 N.Y.S.2d 988 (1976); N.D. Cent. Code § 12.1-17 (Save abortion, killing an unborn is feticide from conception forward). *See also, Prosser and Keeton on the Law of Torts* ("With recent advances in embryology and medical technology medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether"). *Id.* at 369 (footnote omitted).

even if the child is stillborn,[12] and even if the injury takes place preconception.[13] These expansions reflect increased willingness to acknowledge a duty of care to those yet to be born.[14]

B. Society Demands That Employers Be Obliged to Protect the Health and Safety of Workers and the Public, Including Those Yet to Be Born.

For most members of society, worklife constitutes the greater part of the day. Potentially, therefore, one's working conditions have a greater impact upon that individual's health and safety—including the health and safety of his or her offspring—than any other environmental factor.[15] From this perspective, it is not only good public policy but necessary that employers be obliged to exercise responsibility for the effect of working condi-

[12] *See, e.g., Amadio v. Levin*, 501 A.2d 1085, 1087 n.3 (Pa. 1985) (holding child born dead can maintain survival and wrongful death action for injuries suffered while *en ventre sa mere* and citing other jurisdictions permitting similar recovery); *Crooks v. Williams*, 508 A.2d 912 (D.C. 1984) (damages for negligence leading to stillbirth in 8th month of pregnancy).

[13] *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977) (Infant has the right to be born free of prenatal injuries which were foreseeable from preconception blood transfusion to mother); *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237, 239-40 (10th Cir. 1973). *Bergstresser v. Mitchell*, 577 F.2d 22, 26 (8th Cir. 1978); *In re Agent Orange Products Liability Litigation*, No. MDL-381 (E.D.N.Y. May 14, 1979).

[14] Increasingly, states are also according unborn children rights to recover child support. *See, e.g., Doe v. Roe*, 543 So.2d 741, 749 (Fla. 1989), *cert. denied*, 110 S. Ct. 405 (1989) ("[I]t was critical to the well being of the child that the unwed father provide prebirth support"); *Brown v. Snyder*, 1989 WL 155738 (Ohio App. Dec. 21, 1989) (Westlaw Allstates Database) (Father owes retroactive child support and prenatal and birth expenses).

[15] Petitioners specifically acknowledge the possibility of harm to workers and their offspring in the instant case. *See* Pet. Brief at 5, 6, and 7.

tions upon health and safety. Moreover, Americans have specifically demanded that companies exercise ever greater responsibility for consequences of their businesses that may affect the public. Employees and their unions have led the cause for regulation to safeguard the health and safety, not only of employees, but of third parties including their families.[16] As one commentator has aptly noted: "Indeed, as the country has become increasingly burdened by industry's hazardous products, byproducts, and wastes, government increasingly has required, at substantial expense to industry, that health, including fetal health, become a corporate concern."[17] This trend has continued unabated as corporations have been obliged to implement protective measures for society's health and safety. Adoption of fetal protection policies is consistent with their obligation to behave responsibly toward *all* members of society they affect. Petitioners' arguments to the contrary are inconsistent with this widespread call for employer responsibility.

[16] It is worth noting that union officials have specifically recognized the importance of safety measures for the unborn. In 1989, union officials, including the president of the Public Employees Department of the AFL-CIO and the president emeritus of the International Ladies Garment Workers Union, recognized the importance of responsibility toward children beginning before their birth:

> Investments in children and their families are essential to this nation as we head into the next century. . . . As important, our prevention principle has the greatest meaning here: a dollar spent in early life to prevent early damage yields substantial savings for the society and for the individual downstream.
>
> The investment must begin before the child is born.

American Assembly, *The Final Report*, 13 American Family 12, 13 (Jan. 1990).

[17] Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Goals under Title VII*, 69 Geo. L.J. 641, 645 (1981).

Employers are obliged to maintain certain minimum safety standards in the workplace not just for the benefit of employees, but for their families, their children, and the public. *See, e.g.*, Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-78 (1982);[18] Toxic Substance Control Act of 1976, 15 U.S.C. §§ 2601-29 (1982). To protect customers, their offspring,[19] and persons harmed by manufactured products, Congress established the Food and Drug Administration to prohibit the use of adulterated or misbranded foods, drugs, and medical devices. Employers have been further legislatively required to consider the safety of consumers through the Consumer Product Safety Act. 15 U.S.C. §§ 2051-83. Significantly, in that Act, Congress recognized employers' expertise in protecting consumers: "[T]he products' complexity and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately." 15 U.S.C. § 2051(a)(2). The pattern of statutory activity shows that public policy has consistently extended the reach of corporate obligations, beyond the range of workers or customers, to the public at large.[20]

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[18] Significantly, while Congress recognized the coercive power of the OSHA concerning worker health and safety, it also expressed hope that the Act would cause employers to act upon their own initiative as well. 29 U.S.C. § 651(a)(1)(4)(13) (1982).

[19] In 1971, the Food and Drug Administration ("FDA") withdrew its approval of diethylstilbestrol ("DES") for use during pregnancy after scientific findings indicated its dangers to the offspring of women who had ingested it. *See Shields v. Eli Lilly & Co.*, 895 F.2d 1463 (D.C. Cir. 1990) (FDA banned DES after evidence linked it to development of clear-cell vaginal cancer in women whose mothers took it during pregnancy).

[20] The series of environmental obligations placed on businesses arising from "normal operations" involving the discharge or disposal of waste indicates the shift in concern to an increasingly broad range of potential victims. *See* Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-57 (1982).

Thus the law has made employers increasingly accountable for personal health and safety not only of customers but the public. Products liability law reflects this trend. Since the early 1900's the "frequency and severity of products liability actions have been massive, no matter the system of accounting."[21] Additional developments in this area of the law have made manufacturers increasingly responsible for the safety of consumers and others.[22]

Employers are uniquely well-situated and ethically compelled to contribute to protecting their employees' offspring. Employers are "experts" with respect to the product or service they offer. They are well-positioned to expend research and development funds to determine how to conduct business most safely.[23] Because they understand their businesses, employers are also able to respond most quickly to changes in the science or technology their businesses involve without the need for complex administrative and regulatory processes often required by federal or state health and welfare agencies.[24] In this effort,

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[21] Epstein, *The Unintended Revolution in Products Liability Law*, 10 Cardozo L. Rev. 2193 (1989). From 1974 to 1985, the number of products liability cases filed in federal district courts alone increased by 758% from 1579 to 13,55[illegible] S. Rep. No. 422, 99th Cong., 2d Sess. 6 (1986).

[22] *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697 (1963) (strict liability theory adopted in products liability actions); *See also* Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Cracked*, 25 Gonz. L. Rev. 205, 205-207 (1990); *Prosser and Keeton* at 703; *The Restatement (Second) of Torts*, § 395 (1965) (manufacturer is liable to "those whom he should expect to be endangered by [the product's] probable use").

[23] Judge Easterbrook in his dissent below notes: "An employer is better situated than his workers to gather and interpret scientific data." 886 F.2d at 914. Petitioners acknowledge employers' expert status with respect to their products. Pet. Brief at 35 n.31.

[24] *See* 886 F.2d at 899 (Johnson Controls acting upon new evidence that lead levels *below* OSHA standards can harm unborn children).

employers can and should consult firsthand with their employees and their unions who are also very knowledgeable about the practices and hazards of their workplace.[25]

The above examples illustrate that providing appropriate protection for the next generation does not come without sacrifices in the present. Different segments of society bear the responsibility in different contexts for the various safety measures which must be undertaken to safeguard the next generation. Many policies benefiting unborn children are at the same time beneficial to their mothers and fathers. In many instances, as has been demonstrated, employers properly are obliged to bear the predominant costs. In other instances, however, parents bear the burden associated with protecting their unborn children. Ultimately, the burden of protecting the health of future generations should be equitably shared with the parents through the cooperative action of industry and the government. Until that day, that the burden may fall on one or the other responsible party is not, alone, grounds for a conclusion that unlawful discrimination is occurring.

II. PREVENTING THE SUBSTANTIAL RISK OF HARM TO UNBORN CHILDREN FROM EXPOSURE TO LEAD IS A RELEVANT AND LEGITIMATE CONCERN IN EVALUATING AN EMPLOYER'S BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE UNDER TITLE VII.

Johnson Controls excludes women of childbearing capacity from its battery assembly operations as a means of reducing lead exposure to children who might be born to those women. Both parties here agree that lead poses "a *substantial* health hazard to the unborn child in the womb." *International Union, UAW v. Johnson Controls,*

[25] OSHA has, in fact, recognized this latter possibility and specifically encouraged employers to involve employees in developing safe workplace policies. *See* 29 U.S.C. § 651(a)(1)(4)(13).

Inc., 886 F.2d at 879 (emphasis in original). The court concluded that the exclusion under a so-called "fetal protection policy" was "proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead," *id.* at 898-99, and therefore was a bona fide occupational qualification [26] under Title VII. Fetal protection policies present novel and complex questions which will test Title VII's flexibility:

> [A]n employer should not have an absolute right to express its interest in fetal health in any way it chooses and [] the woman employee should not have an absolute right to choose the risk to which she will expose her fetus. The employer does, however, have a legitimate interest in fetal health that should be allowed some form of expression without liability under the equal employment opportunity laws. At the same time women workers have an interest in equal employment opportunity that is threatened by employer exclusionary policies. Women workers also have an interest in protecting their fetuses from harm while protecting employment rights. Thus, even if one accepts the employer premise that the choice presented is between the fetus' right to health and the woman's right to employment, a look at the various interests involved suggests that some compromise of the competing interests should be sought in any resolution of the conflict under title VII.[27]

[26] *See* note 1, *supra*. Even if Respondent's policy were measured in the context of business necessity, concern for the health and safety of the unborn would be a significant relevant factor to be taken into consideration. Both defenses, bfoq and business necessity, have generally developed in the context of job-relatedness (*i.e.*, effective job performance), and have included safety as a relevant consideration. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) (business necessity); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (bfoq).

[27] Williams, *supra* note 17, at 653. For the reasons stated in the text of this Part, this *amicus* disagrees with the author's ultimate conclusion that fetal protection policies can be successfully

The relevant Title VII analysis provides a useful mechanism for evaluating facially discriminatory fetal protection policies by balancing legitimate competing interests.[28]

Title VII affirmatively outlaws discrimination against workers; properly, the rule is broad and the defenses are narrow. In determining its scope and reach, this Court has recognized that Title VII plainly involves a "balance of rights." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989). In this case, the court below concluded that the bona fide occupational qualification ("bfoq") defense under section 703(e)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (1982), must be construed to give "meaningful and thoughtful consideration to the *interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child.*" 886 F.2d at 893 (emphasis in original). This common sense conclusion is supported by the language of the bfoq provision itself, and by judicial interpretations of Title VII and other civil rights statutes.

A. Health and Safety Concerns, Including Potential Harm to the Unborn, Fall within the Meaning of the Bona Fide Occupational Qualification Provision of Title VII.

Whether a fetal protection policy may be a bona fide occupational qualification within the meaning of section 703(e)(1) of Title VII must begin with the language of the statute itself. *Westside Community Board of Educa-*

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defended only as a business necessity but not as a bona fide occupational qualification. *See* note 1, *supra*.

[28] It is not our intention here to evaluate the appropriateness of the particular fetal protection policy at issue here, or the application of available Title VII defenses to it. This will be done by the parties. In addition, there are serious procedural and tactical questions involved in this particular case that make it difficult for this *amicus* to make such an evaluation. For whatever reason, Petitioners "failed to present even one specific alternative to Johnson's fetal protection policy." 886 F.2d at 892.

tion v. Mergens, 110 S. Ct. 2356, 2365 (1990). On its fact, section 703(e)(1) permits sex to be a bona fide occupational qualification only in those limited situations in which it can be demonstrated to be "reasonably necessary to the *normal operation* of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (emphasis added).[29] In business, "operation" is commonly understood as "the whole process of planning for and operating a business or other organized unit." *Webster's Third New International Dictionary* 1581 (4th ed. 1976). "Normal" is synonymous with "regular." *Id.* at 1540. There is no gainsaying that health and safety concerns should be and are a "regular" part of the "whole process of operating a business." *See* discussion in Part I, *supra*. If those safety concerns are related exclusively to one sex or another, sex may be a legitimate basis on which to qualify people for work. In this case, it may be "possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." 886 F.2d at 904 (Posner, J., dissenting). That health and safety concerns are a relevant consideration in determining the applicability of a bfoq defense is amply supported by precedent.

In *Dothard v. Rawlinson*, this Court held that sex was a bona fide occupational qualification for the position of

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[29] In relevant part section 703(e)(1) provides that "[I]t shall not be unlawful employment practice for an employer to hire or employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The language of this provision provides no basis to distinguish, as Petitioners attempt (Pet. Brief at 31 n.29), between safety concerns relating to customers and employees on the one hand, and safety concerns relating to others (*e.g.*, the public including the unborn) on the other.

correctional counselor in contact positions in male maximum security facilities housing a significant number of sex offenders. 433 U.S. 321, 334 (1977). Recognizing that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex," it nonetheless concluded that the regulation at issue fell "within the narrow ambit of the bfoq exception." *Id.* The Court noted that "[m]ore is at stake in this case, however, than an individual woman's decision to weigh and accept risks of employment in a 'contact' position in a maximum security male prison." *Id.* at 335. A significant part of the Court's rationale was that the "likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victims of the assault but also to the basic control of the penitentiary *and protection of its inmates and the other security personnel.*" *Id.* at 336 (emphasis added). Clearly the Court in *Dothard* recognized both that concern for the safety and protection of persons other than the employee is relevant and that sometimes the sex of the worker may be a qualifying factor when scrutinizing a bfoq defense.[30]

Later decisions of the Court continued this approach. In *Western Air Lines, Inc. v. Criswell*, the Court rejected an age requirement (under 60) for flight engineers as a

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[30] Significantly, the Court in *Dothard* also found that safety was a relevant consideration when evaluating business necessity defenses under disparate impact claims. 433 U.S. at 331 n.14 ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"). The concept of effective job performance must include consideration of potential harm to others as a relevant consideration in any context. Because job-relatedness is a significant consideration in both business necessity and bfoq analysis, cases decided under either analysis are relevant insofar as safety considerations are taken into account.

bfoq defense under the Age Discrimination in Employment Act of 1967 ("ADEA"). 472 U.S. 400 (1985). The Court recognized that the airline had a legitimate interest in alleviating safety risks but held that it had failed to adopt a "reasonably necessary" means of achieving that goal. Importantly for analytical purposes here, the Court specifically noted that, in adopting the ADEA's bfoq standard (which is identical to Title VII's bfoq provision), "Congress did not ignore the public interest in safety." *Id.* at 419. Similarly, this Court upheld a transit system's safety rule against employing persons who regularly use narcotic drugs, including legally prescribed methadone, because it served the transit system's "legitimate employment goals of safety and efficiency." *New York City Transit Authority v. Beazer*, 440 U.S. at 587 n.31.

The "public interest in safety" necessary to satisfy bfoq requirements under Title VII must extend beyond employees and customers to members of the public who may be affected by a company's normal business operations.[31] Similarly the Fifth Circuit held that a bus company's refusal to accept applications for driver positions from persons between 40 and 65 years of age was a bona fide occupational qualification under the ADEA. *Usery*

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[31] At least three Title VII lower court cases have recognized that concern for fetal life is a legitimate concern of employers. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982). These cases were decided under a business necessity analysis. Of significance here is not the analysis used or the particular outcome in these cases, but rather the acknowledgment that the potential harm to the unborn is a significant relevant concern in deciding Title VII employment cases. From a public policy perspective it makes no sense to attempt to sever legitimate societal concerns with safety (in this case harm to unborn children) from the bfoq analysis as Petitioners and some *amici curiae* would argue.

v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). The court recognized:

> the significance of safety to passengers and *members of the public*. We emphasize safety in busing first as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb.

Id. at 238 (emphasis added). Nothing in Title VII precludes that consideration. It would be foolish public policy to suggest that it should.

That Title VII is a civil rights statute is unavailing. Concerns with safety heave been prominently considered in federal laws prohibiting discrimination against otherwise qualified individuals on the basis of handicap, as well as cases decided under Title VII and the ADEA. By definition, handicapped individuals suffering from drug addiction or alcoholism are not "otherwise qualified" individuals for employment purposes under sections 503 and 504 of the Rehabilitation Act of 1973 if, because of their condition, employment "would constitute a direct threat to property or the safety of others." 29 U.S.C.A. § 706(8)(B) (West Supp. 1990). Persons currently afflicted with a contagious disease or infection are treated similarly if "by reason of such disease or infection [they] would constitute a direct threat to the health or safety of other individuals." 29 U.S.C.A. § 706(8)(C) (West Supp. 1990). Moreover, in *School Bo[illegible]. Arline*, this Court recognized that it was necessary [illegible]ve "appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." 480 U.S. 273, 287 (1987). In essence, the *Arline* Court concluded that a person whose employment poses a significant health and safety risk to others is not

qualified "to perform the 'essential functions' of the job. 45 C.F.R. § 84.3(k) (1985)." 480 U.S. at 387 n.17.

Precedent provides ample support that the health and safety of others, including fellow employees, customers, and the public, including the unborn, is a significant and legitimate factor in evaluating employer policies under Title VII, as well as other civil rights statutes. As noted by the Solicitor General, Petitioners' argument leads to the extreme conclusion that an employer "could never consider harm to third parties from the manufacturing process [and] would render invalid any gender-based fetal protection policy . . . even if there was absolute certainty of harm to the fetus [in the case of a pregnant woman] from exposure to a toxic substance in the course of employment." *Amicus curiae* Brief for the United States at 9. The bfoq provision in Title VII cannot fairly be read to require such an absolute and harsh result.

B. In the Pregnancy Discrimination Act Congress Did Not Exclude Fetal Protection Policies from the Bona Fide Occupational Qualification Defense.

Petitioners and some *amici curiae* argue that Congress intended the Pregnancy Discrimination Act ("PDA")[32] "to exclud[e] fetal protection concerns from the bfoq defense." Pet. Brief at 42.[33] Petitioners argue that the

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[32] Pub. L. No. 95-555, 92 Stat. 2076 (1978). The Act overruled *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert* the Court held that an employer's failure to cover pregnancy-related disabilities in its disability benefits plan did not constitute discrimination on the basis of sex within the meaning of Title VII.

[33] *See amici curiae* Brief of Equal Rights Advocates, *et al.* These *amici* also contend that the legislative history of the PDA can be interpreted to prohibit employers from taking punitive action (*i.e.*, firing or refusing to hire) against women who independently elect to have an abortion outside of the workplace. *Id.* at 28-30. Assuming *arguendo* that there may be support for that proposition, it does not follow, as *amici* argue, that Congress in-

PDA made it clear "that only performance-related considerations can be taken into account when determining whether women of childbearing capacity are to be excluded from job opportunities." *Id.* at 31. The fundamental flaw in this approach is the implicit assumption that "performance-related considerations" somehow must exclude health and safety concerns, including harm to the unborn, something that society, Congress, and the courts routinely recognize as important and legitimate. Nothing in the PDA or its legislative history supports this conclusion.

Congress passed the PDA to amend Title VII by adding a new definition of sex to section 701. Section 701(k) provides in relevant part that:

> women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1982). Petitioners seize on the phrase "similar in their ability or inability to work" to conclude that "only performance-related considerations" (Pet. Brief at 31) can be taken into account in judging gender-based distinctions. In effect, Petitioners argue that the term "ability or inability to work" should be

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tended to prohibit an employer from adopting policies designed to minimize the risk of harm to unborn children caused by *its own activities*. Indeed, the PDA specifically allows an employer to exclude abortion from its health benefits plan in all but the most extraordinary circumstances. It follows logically that the PDA cannot be fairly read to require, in effect, that an employer cannot prevent an *employee* from exposing unborn children to harm in its workplace. *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (consistent with the legitimate government interest in promoting childbirth, the federal Medicaid program is not required to pay for abortions).

read to include the phrase "without regard to the safety of third parties (or any other similar concern)." The latter phrase, of course, does not appear in the statute. Because Congress has repeatedly expressed concerns about health and safety in a variety of contexts,[34] any suggestion that such a reading was intended would appear unsupportable. Indeed, safety concerns had been a consideration in interpreting civil rights statutes, including Title VII, prior to the enactment of the PDA in 1978.[35] No inference that Congress intended to exclude safety concerns when it used the words "ability or inability to work" is legitimate.

Petitioners' attempt to rely on legislative history is unavailing. Specific reliance is placed on (i) testimony provided on behalf of an *opponent* of the PDA, and (ii) a single question and non-responsive answer in a hearing record of more than one thousand pages.[36] In his testimony before the Subcommittee on Employment Opportunities of the House Committee on Education and

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[34] *See* discussion in Part I, *supra*.

[35] *See, e.g., Dothard v. Rawlinson, supra* (sex as a bfoq); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (Title VII—nonpregnancy as a bfoq); *Usery v. Tamiami Trail Tours, Inc., supra* (ADEA—age as a bfoq); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied, Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975) (ADEA—age as a bfoq).

[36] Petitioners' reliance on OSHA (Pet. Brief at 40-41) is also misplaced. Standards developed by other agencies are not accorded conclusive weight under Title VII. *See Western Air Lines, Inc. v. Criswell, supra*; *Johnson v. Mayor of Baltimore*, 472 U.S. 353, 370-71 (1985). There is not a single mention of OSHA in the majority reports or the floor debates on the PDA. In addition, setting standards under OSHA is a time-consuming and controversial process not well-suited to adapt to changes in scientific data and research. *See* Furnish, *Prenatal Exposure to Fatally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 66-74 (1980).

Labor, G. Brockwel Heylin, testifying on behalf of the Chamber of Commerce of the United States, raised the issue of potential harm to unborn children in both written and oral testimony.[37] Petitioners' suggestion that this testimony shows that Congress intended to exclude safety of the unborn is seriously flawed. The Chamber of Commerce *opposed* the PDA.[38] The Chamber's primary concern centered around the potential financial costs associated with mandated changes in employee health and leave benefit plans, not protecting the unborn.[39] Moreover, this latter concern "was not even made the subject of comment by the majority reports or in the debates." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956). "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The other snippet from legislative hearings cited by Petitioners occurred on the first day of the Senate hearings, when Senator Orrin G. Hatch of Utah asked Dr. Andre E. Hellegers, a supporter of the PDA, the following question:

> Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women? [40]

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[37] *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and 6075, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84-92 (1977) (statement and testimony of G. Brockwel Heylin).

[38] Even when attributed to members of Congress, "[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). *A fortiori*, the testimony of a witness from the general public who opposed the bill is even less of a guide. *See Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

[39] *See* statement and testimony of G. Brockwel Heylin, *supra* note 37.

[40] *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 67 (1977) (hereinafter "*Senate Hearings*").

Senator Hatch did not mention fetal protection policies, nor offer any view whether he thought the PDA would or should prohibit such policies.[41] Dr. Hellegers did not directly respond to this simple general question. Instead, he took the opportunity to state his concern for the need for increased research on the untoward effects of industrial processes on men, women and the unborn.[42] One commentator has aptly described the exchange between Senator Hatch and Dr. Hellegers as follows: "One senator made a fleeting reference to fetal problems in a question to an expert witness, to which a quick and unedifying response was made . . . . The legislative history is generally lacking in reference to the problem of fetal harm." [43] Petitioner's reliance on the exchange between

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[41] The Chamber of Commerce did not appear during the April, 1977 Senate hearings but did submit a statement for the record more than two weeks after the hearings ended. *See id.* at 481. Given this fact it is difficult to understand the assertion by some *amici* that Senator Hatch "quickly pursued the Chamber's point." Brief of *amici curiae* Equal Rights Advocates, *et al.* at 5.

[42] *Senate Hearings* at 67.

[43] Furnish, *supra* note 36, at 78-79. Later in the hearings Senator Hatch commented to another witness that "[i]f we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should." *Senate Hearings* at 110. Again, Senator Hatch did not specifically mention fetal harm nor did he indicate that he thought the PDA would prohibit fetal protection policies. On the other hand, in other parts of his testimony, Dr. Hellegers made known he was "opposed to abortion" (*Senate Hearings* at 64), and made numerous references to his concern about harm to the unborn (*id.* at 63-80), and "the terrible price we have to pay when we don't take care of infants before they are born" (*id.* at 65). Clearly, Dr. Hellegers supported the PDA because he understood it to protect pregnant women *together with* their unborn children. PDA's chief sponsor in the Senate, Senator Williams, referred during floor debate to the relationship between "loss of income . . . and a deterioration of the health of the pregnant woman and of her child." 123 Cong. Rec. 29386

Senator Hatch and Dr. Hellegers is misplaced. No mention of the question of fetal harm is made in the Senate Committee Report [44] or the Senate floor debate.[45] In construing statutes on delicate and controversial issues, Congressional silence is not a fair basis on which to infer intent. *Girouard v. United States, supra. See Mastro Plastics Corp. v. NLRB, supra.*

On the other hand, the PDA and its legislative history indicate that Congress did not intend to create an exception to Title VII's bfoq provision. When it enacted the PDA, Congress was well aware that health and safety concerns were a relevant consideration in evaluating bfoq defenses, including some cases where nonpregnancy had been raised as a bfoq (*see* cases cited in note 35, *supra*), and that the bfoq provision on its face applied to policies related to sex. The Senate Committee report states clearly that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy, childbirth, and related medical conditions] peculiar to women; *it does not change the application of Title VII in any other way.*" [46] This is particularly important because, in enacting the PDA, the Congress clearly knew how to except pregancy (and child-

---

(1977) (remarks of Sen. Williams). It would be cynical to assume that Congressional supporters of the PDA, who were widely proclaiming the benefits of the PDA for the well-being of unborn children, at the same time silently intended to eliminate health and safety concerns for the unborn as a relevant consideration in evaluating a bfoq (and other defenses) under Title VII.

[44] S. Rep. No. 331, 95th Cong., 1st Sess. (1977).

[45] 123 Cong. Rec. 29384-89, 29640-65 (1977).

[46] S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (emphasis added). *See* also H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978) ("[W]e recognize that enactment of H.R. 6075 [the PDA] will reflect no new legislative mandate of the Congress nor effect changes in practices, costs or benefits beyond those intended by Title VII of the Civil Rights Act.").

birth and related medical conditions) from otherwise generally applicable provisions of Title VII.

PDA's new definition of sex included the provision that "nothing in section 703(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). Like the bfoq provision in section 703(e)(1), section 703(h) contains a provision allowing an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employers if such differentiation is authorized by the provisions of section 206(d) of the Equal Pay Act. 42 U.S.C. § 2000e-2(h) (1982). With the PDA, Congress placed in the statutory definition of sex a specific exception relating to section 703(h). It could have easily done the same thing with respect to the bfoq provision, which on its face applied to sex discrimination claims, but chose not to do so. If any inference is to be drawn from the PDA and its legislative process, it is that Congress did not intend to create an exception to the bfoq provision when it enacted the PDA.

After reviewing the relevant statutory record, Title VII does not preclude Johnson Controls from using its fetal protection policy to avoid the unalterable risks that accompany lead exposure. Against the context of the general legislative demands that businesses be compelled to shoulder the responsibility for public protection against the risks associated with industrial processes, Title VII should not be read as somehow preventing employers from protecting not just their employees, but their offspring and the public, against workplace hazards.

CONCLUSION

For the above stated reasons, the conclusion below that Johnson Controls' fetal protection policy is properly evaluated under Title VII was correct. Therefore, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The vast majority of its members are subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et. seq.* (1982) ("Title VII")) and to the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970)

* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court.

(codified at 29 U.S.C. § 651 *et. seq.* (1988)) ("OSH Act")).

The Chamber is filing this brief *amicus curiae* in support of respondent because it believes that preservation of the right of employers to adopt fetal protection policies and other voluntary policies to safeguard the health of their employees is important. Such voluntary programs reflect both sound business practice and good corporate citizenship and are consistent with, indeed serve, the goals of applicable federal legislation.

SUMMARY OF ARGUMENT

Petitioners urge that Congress in the Pregnancy Discrimination Act (Title VII § 701(k), 42 U.S.C. § 2000e(k) (1982) ("PDA")) required employers to blind themselves to the risks of birth defects caused by various substances, risks recognized by a wide variety of federal agencies and that are particularly acute in the case of lead.

Congress had no such intent in enacting the PDA. In the PDA, Congress sought to restore in the area of pregnancy the disparate treatment theory rejected by this Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But in doing so, Congress required only that employees who are pregnant or are affected by "related medical conditions . . . be treated the same . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The legislative history of the PDA confirms this purpose, repeatedly emphasizing the requirement of equal treatment of similarly situated employees. Nothing in the legislative history indicates that the statute was designed to foreclose consideration of employee and fetal health. To the contrary, preservation of fetal health was a central goal of the legislation.

This interpretation of the PDA is buttressed by the need to reconcile the PDA with the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651 *et seq.* (1988)) ("OSH

Act")). The OSH Act embodies a strong federal policy of encouraging voluntary employer action to protect the health of employees and the children they bear. Consistent with this Court's decisions requiring the reconciliation of federal statutes, the Court should not construe the PDA to undermine this important purpose of the OSH Act.

Finally, petitioners have not shown that the employer's fetal protection policy in this case violates the standards of the PDA. The burden of proof to establish disparate treatment rests on the plaintiffs. Petitioners make no claim that the employer's action was pretextual or arbitrary, and they have made no showing that the employer treated similarly situated employees differently. As the Court of Appeals concluded, the evidence of similar risks of birth defects through male exposure was "speculative," and petitioners failed to shoulder their burden of showing the existence of similar risks through exposure of men. Accordingly, petitioners have made no showing of unequal treatment.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS REPEATEDLY EXPRESSED CONCERN OVER THE DANGERS OF BIRTH DEFECTS RESULTING FROM MATERNAL EXPOSURE TO VARIOUS SUBSTANCES INCLUDING LEAD.

Petitioners cannot dispute that preventing birth defects by reducing or eliminating occupational exposure to certain substances is a "legitimate and significant" societal interest.[1] Nor do they deny that lead is a toxic substance. Indeed, petitioners admit that lead "poses a risk of significant harm to fetuses of pregnant workers" (Pet. Br. 5), and the District of Columbia Circuit has characterized that risk as a "grave danger."[2] Petition-

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[1] *See, e.g.*, Br. *Amici Curiae* of State of California, *et al.* 2.

[2] *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

ers also do not deny that congenital lead poisoning may create irreversible fetal damage[3] and did not argue that there is any reasonable way to preclude congenital lead poisoning other than exclusion of women from the workplace where high levels of lead are present.[4] Petitioners' concessions are not surprising. The federal government's Centers for Disease Control ("CDC") have concluded that "[t]he prevention of lead exposure to the fetus needs special emphasis. Women of child-bearing age should be excluded from working at jobs where significant lead exposure occurs." JA 184.

Additionally, over the past decade, a host of other federal agencies have issued warnings concerning prenatal exposure to various substances.[5] For example, the federal government has warned pregnant women against even moderate alcohol consumption which, although not endangering the woman's health, may cause severe birth defects,[6] and requires that warnings regarding the possible adverse effects of alcohol consumption during pregnancy be printed on all alcoholic beverage containers.[7] Federal law also requires cigarette manufacturers to place on all cigarette packages and in cigarette advertisements conspicuous warnings that smoking may com-

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[3] *See* Chisolm Aff. ¶ 6, JA 199; Scialli Aff. ¶¶ 7, 10, JA 180-81.

[4] *See* Resp. Br. 12.

[5] The tort protection the common law affords to unborn and newborn children also reflects society's concern for fetal health. *See* Resp. Br. 27-28.

[6] U.S. Dep't of Health, Educ. & Welfare, *Drugs and Pregnancy*, at 3, *reprinted from* FDA Consumer (Oct. 1978); U.S. Dep't of Health & Human Services, *My Baby . . . Strong and Healthy*, at 5-7 (1986); U.S. Dep't of Health & Human Services, *Drugs and Pregnancy: Often The Two Don't Mix*, at 3, *reprinted from* FDA Consumer (June 1989).

[7] 27 U.S.C. § 215(a) (1988). The required warning reads "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects." *Id.*; 55 Fed. Reg. 5414, 5416 (1990).

plicate pregnancy.[8] Governmental agencies also warn pregnant women to refrain from all drug use, including aspirin, because drugs may have detrimental health effects on the children they bear.[9] In appropriate cases, the government itself has banned fertile women from jobs involving particularly toxic substances. For example, in an effort to prevent "abnormal children," the Environmental Protection Agency has banned women of child-bearing age from all jobs involving application of Ferriamicide, a pesticide particularly likely to cause birth defects through maternal exposure.[10]

The federal government has expressed especially strong concern over congenital defects resulting from lead poisoning. In addition to the CDC (*see supra* p. 4), two other federal agencies—the Environmental Protection Agency and the Consumer Product Safety Commission--have reported that:

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[8] 15 U.S.C. § 1333(a) (1988). One of the mandated warnings reads "SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight." 15 U.S.C. § 1333(a)(2).

[9] *Drugs and Pregnancy*, *supra*, at 1; *Drugs and Pregnancy: Often the Two Don't Mix*, *supra*, at 1-4. Federal law requires that warnings be placed on the labels of many over-the-counter medications. *See, e.g.*, 55 Fed. Reg. 27,776 (1990) (requiring new warning statement in addition to general pregnancy-nursing warning to appear on all over-the-counter aspirin and aspirin-containing products: ". . . IT IS ESPECIALLY IMPORTANT NOT TO USE [ASPIRIN] DURING THE LAST THREE MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.").

[10] *See Women Prohibited from Using Pesticide: EPA Defends Decision as "Justifiable,"* O.S.H. Rep. (BNA) 1481-82 (Feb. 22, 1979) (quoting letter of EPA Deputy Administrator, Barbara Blum). *See also* 43 Fed. Reg. 47,774, 47,776, 47,786 (1978); 44 Fed. Reg. 11,111, 11,112, 11,117 (1979); 47 Fed. Reg. 46,884, 46,885 (1982) ("All applications [of Ferriamicide] will be made by certified applicators only. . . . Women of child-bearing age are prohibited from loading/applying Ferriamicide.").

> Fetuses, infants and children are more vulnerable to lead exposure than adults since lead is more easily absorbed into growing bodies, and the tissues of small children are more sensitive to the damaging effects of lead. In addition, an equal concentration of lead is more damaging because of a child's smaller body weight.[11]

The Department of Housing and Urban Development's Lead-Based Paint Interim Guidelines require workers involved in lead abatement projects to undergo special training to learn about the health hazards of lead:

> The training program should include information from recent research studies indicating that (1) lead is transferred from the mother to the fetus during pregnancy, and (2) exposure of the fetus to lead, even at low concentrations, is associated with developmental effects.[12]

Finally, the Federal government has published extensive research findings on the possible long-term negative effects of prenatal exposure to lead:

> The effects of lead exposure on fetuses and young children include delays in physical and mental development, lower IQ levels, shortened attention spans, and increased behavioral problems.[13]

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[11] U.S. Environmental Protection Agency and Consumer Product Safety Comm'n, *The Inside Story, A Guide to Indoor Air Quality*, at 25 (Sept. 1988). *See also* U.S. Environmental Protection Agency, *Lead and Your Drinking Water*, at 2 (April 1987); U.S. Environmental Protection Agency, *Air Quality Criteria for Lead*, Vol. IV, at 13-46 (June 1986) ("pregnant women and their concepti as a subgroup are demonstrably at higher risk [than men]").

[12] Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing, 55 Fed. Reg. 14,556, 14,581 (1990). *See also Air Quality Criteria for Lead*, *supra*, at 13-46 ("[u]mbilical cord blood studies involving mother-infant pairs have repeatedly shown a correlation between maternal and fetal blood lead levels"); *Lead Poisoning Prevention Program: Hearings Before the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development of the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. (1990) (testimony of Kathryn Mahaffey, Ph.D.).

Petitioners would require employers to ignore the undeniably substantial risks of birth defects caused by congenital lead poisoning. Neither logic nor federal law requires that result.

II. THE PREGNANCY DISCRIMINATION ACT DOES NOT BAR VOLUNTARY EMPLOYER ACTION TO PROTECT EMPLOYEES AND THEIR OFFSPRING FROM EXPOSURE TO TOXINS IN THE WORKPLACE.

Petitioners and their *amici* urge, as one of their arguments for reversal, that this case is governed by the Pregnancy Discrimination Act (42 U.S.C. § 2000e(k) ("PDA"))[14] a federal statute designed to define the circumstances in which distinctions on grounds of pregnancy or "related medical conditions" constitute intentional discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1982) ("Title VII")).[15] We agree, but reach diametrically opposite conclusions as to the purpose and scope of that statute.

Relying on the first clause of the PDA, which states that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. § 2000e(k)), petitioners and their *amici* argue that Congress designed the PDA to make any dis-

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[13] *The Inside Story*, *supra*, at 25. *See also* National Institute of Environmental Health Sciences, Conference Summary, *Advances in Lead Research: Implications for Environmental Health* (Jan. 16-18, 1989); *Lead and Your Drinking Water*, *supra*, at 2; *Air Quality Criteria for Lead*, *supra*, at 13-46; Lead-Based Paint: Interim Guidelines, *supra*, at 14,561.

[14] Pet. Br. 16-20. *See, e.g.*, Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 1.

[15] Petitioners also argue (Pet. Br. 12-16) that this is an ordinary gender discrimination case, a contention that is clearly inconsistent with this Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). *See infra* pp. 8-10.

tinction between pregnant female employees and male employees unlawful. *See* Pet. Br. 17, 20; Br. *Amici Curiae* Equal Rights Advocates, *et al.* 19. In this respect, these parties virtually ignore the second clause of the PDA, which provides: "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That clause, and the legislative history of the PDA, make clear that the purpose of the PDA was to apply disparate treatment theory to pregnancy. At the same time, the plain language of the statute requires that the comparison be made between women affected by pregnancy and related medical conditions and other persons with similar medical conditions that affect their ability to work.[16] Because the employer's policy does not involve impermissible disparate treatment under the PDA, this Court need not reach the question whether the BFOQ defense is available to the employer.[17]

A. The PDA Restored the Disparate Treatment Theory's Application to Pregnancy-Related Policies.

By overruling this Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the PDA restored the disparate treatment theory to plaintiffs' arsenal when challenging pregnancy-related policies. At the same time, the PDA defined how the Courts should apply the disparate treatment theory to pregnancy and "related medical conditions," conditions which, by definition, apply only to women and which were viewed as both warranting and requiring special consideration in the employment context.

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[16] All parties appear to agree that "related medical conditions" includes the condition involved here—the ability of a woman to bear children. *See, e.g.*, Pet. Br. 17; Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 13.

[17] As urged by respondent, we agree that such a defense is available.

The relevant judicial history began well before *Gilbert*. From the very outset, § 703(a)(1) of Title VII clearly banned disparate treatment based upon "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1982). In 1971, seven years after the passage of Title VII, this Court first embraced an entirely different theory of discrimination, the disparate impact theory, brought under a different statutory provision, (§ 703(a)(2) (*Id.* § 2000e-2(a)(2)). *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact claims brought pursuant to § 703(a)(2) "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." [18]

This Court has invoked both disparate treatment and disparate impact theories, and, correlatively both §§ 703(a)(1) and 703(a)(2), to invalidate employer policies as discriminatory against women.[19]

In *Gilbert*, the Court faced its first Title VII challenge to an employer's pregnancy-related policy. The employer's nonoccupational sickness and accident disability plan excluded from coverage disabilities arising from pregnancy, thus treating women who were unable to work because of pregnancy differently than employees suffering other disabling conditions. The Court held this policy did not constitute disparate treatment in violation of Title VII because there " 'is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' " [20]

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[18] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

[19] *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (disparate treatment theory relied on to strike down an employer's refusal to hire women, but not men, with pre-school-age children); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (state minimum height and weight requirements for prison guards invalidated under disparate impact theory).

[20] *Gilbert*, 429 U.S. at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). This Court acknowledged that benefit plan

One year after *Gilbert*, in *Satty*, plaintiffs challenged the employer's denial of sick pay for women disabled by pregnancy while granting sick leave to employees disabled from all other nonoccupational conditions. This Court held that the policy was "indistinguishable" from the policy in *Gilbert*, and, accordingly, did not constitute disparate treatment (434 U.S. at 143). However, the Court remanded for further proceedings to determine if the exclusion was pretextual.[21]

Read together, *Gilbert* and *Satty* foreclosed the vast majority of disparate treatment and disparate impact challenges to pregnancy-related exclusions from fringe benefit plans.[22] Although it foreclosed most challenges to benefit plans, however, this Court preserved the ability of women to challenge other pregnancy-related employment policies under disparate impact analysis.[23] The pri-

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distinctions based on pregnancy would constitute disparate treatment in violation of § 703(a)(1) if those distinctions were " 'mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.' " 429 U.S. at 135 (citation omitted). The plaintiffs in *Gilbert* did not challenge the employer's policies under the disparate impact theory. *Id.* at 137.

[21] The Court also held that an employer's denial of accumulated seniority to women returning to work following pregnancy leave, while granting such seniority to workers returning from any other disability leave, did not constitute impermissible disparate treatment, but had a disparate impact on women and thus contravened Title VII. *Satty*, 434 U.S. at 141.

[22] Dictum in *Satty* virtually precluded the future use of the disparate impact theory as a vehicle to attack pregnancy-related distinctions, or any distinction for that matter, in employee *benefit* plans. Referring to the wording of § 703(a)(2), *Satty* concluded that "it is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program 'would deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee' in violation of § 703(a)(2)." 434 U.S. at 144-45.

[23] As noted in *Satty*, women could challenge pregnancy-based policies that "would deprive [an] individual of employment opportunities" or "otherwise affect his status as an employee" using § 703(a)(2)'s disparate impact analysis. 434 U.S. at 144-45. Indeed, the plaintiff in *Satty* did so successfully. *See supra* n.21.

mary focus of Congressional concern in passing the PDA was to restore disparate treatment analysis as a basis for challenging the exclusion of pregnancy and "related medical conditions" from fringe benefit plans.[24] At the same time, Congress sought to apply that same analysis to other pregnancy-related employment policies.

Congress acted promptly to overrule *Gilbert's* and *Satty's* refusal to apply section 703(a)(1)'s disparate treatment theory to pregnancy-related policies. Passed less than a year after *Satty*, the PDA added the following provision to the definitional section of Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.*[25]

B. The PDA Bars Only Disparate Treatment of Pregnant Women and Similarly Situated Employees.

The proper interpretation of the 1978 amendment requires an examination of the "PDA's language against the background of its legislative history and historical context." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). By ignoring the essential historical context of the PDA, and by focusing exclusively

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[24] This Court correctly observed in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987), that the "context in which Congress considered the issue of pregnancy discrimination" centered on extensive evidence of discrimination against pregnant women, "particularly in disability and health insurance programs like those challenged in *Gilbert* and [*Satty*]." Furthermore, "[o]pposition to the PDA came from those concerned with the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion." *Id.* at 286.

[25] Title VII § 701(k), 42 U.S.C. § 2000e(k) (1982) (emphasis added).

on the first clause of the amendment, petitioners seriously misconstrue the entire thrust of the PDA, which merely was to restore the application of the disparate treatment theory of § 703(a)(1) to pregnancy-related policies. The PDA was not designed to excuse plaintiffs challenging pregnancy-based policies from shouldering the burden of showing that the pregnancy-related policy constituted unequal treatment and failed to achieve "comparability among employees."[26] Thus, while the PDA made "clear that distinctions based on pregnancy are *per se* violations of Title VII,"[27] the question remained as to what other group was to be compared with pregnant women to determine whether an impermissible distinction existed. The PDA's second clause sets forth the relevant comparison.[28]

Unlike non-pregnancy based gender distinctions involving distinctions between women and men, the comparison required by the PDA was not between pregnant women and men, but between women affected by pregnancy and other employees who are similarly situated. This is made clear not only in the plain language of the statute, but also in the committee reports and debates. The House Report confirmed that "[t]he bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability

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[26] S. Rep. No. 331, 95th Cong., 1st Sess. 5 (1977) ("*Senate Report*"). *See also* H.R. Rep. No. 948, 95th Cong., Sess. 4 (1978) ("*House Report*") ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.").

[27] *House Report* at 3.

[28] Petitioners and *amici* Equal Rights Advocates, *et al.*, recognize the existence of the second clause but, without any support in the legislative history, suggest that it is relevant only to the BFOQ defense and not to the issue of whether disparate treatment exists. Pet. Br. 31-33; Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 20.

to work."[29] An identical description appears in the Senate Report. *Senate Report* at 4. As the Senate Report makes clear, the second clause of the PDA requires a straightforward, two part analysis: First, women affected by pregnancy, childbirth or related medical conditions "who are able to work must be permitted to work on the same conditions as other employees." *Id.* at 4. Second, women who are "not able to work for medical reasons . . . must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working." *Id.* As the Senate Report concluded:

> Under this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work.[30]

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[29] *House Report* at 4. *See also id.* at 3 (The bill "specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.").

[30] *Senate Report* at 4. Petitioners concede that this statement from the legislative history accurately reflects Congressional intent. Pet. Br. 32. The EEOC's *Questions and Answers on Pregnancy Discrimination*, published promptly after the PDA's passage, also reflect this central purpose of the PDA:

> The *basic principle* of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. 29 C.F.R. § 1604 (App.) (emphasis added).

This view of the legislative history has been confirmed in law review commentary:

> The Senate committee report clearly states that the basic standard embodied in section 701(k) is "comparability among employees." As one senator explained in debate, the "touchstone of compliance" with the amendment is equality of treatment. Both the literal language of the amendment and abundant, unambiguous legislative history compel this interpretation of the subsection. Thus, differential treatment of employees for any employment related purpose must be based on differences in the employees' ability or inability to work

Senator Williams, the floor manager of the bill in the Senate, clearly stated this standard during the Senate debate on the PDA:

> The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. *The key to compliance in every case will be equality of treatment.*[31]

Senator Javits, a co-sponsor of the bill, also made it clear that "[t]he bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions . . . . [T]he bill adopts as its standard equality of treatment . . . ." [32]

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rather than on differences in sex, including differences resulting from pregnancy, childbirth or related medical conditions. Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 Wash. U. L. Q. 607, 628-29 (1980) (footnotes omitted). Congress recognized that "principles of comparable treatment would provide full redress to the inequities of such practices," and that "[t]his intent is codified in the PDA's second clause which functions specifically to reverse *Gilbert*." Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 937 (1985) (footnotes omitted).

[31] 123 Cong. Rec. 29,385 (1977) (emphasis added).

[32] *Id.* at 29,387. Similar views were expressed in the hearings. For example, Senator Kennedy stated:

> [The bill] merely requires that employers who have disability plans for their employees treat pregnancy-related disabilities in the same fashion that all other temporary disabilities are treated with respect to benefits and leave policies.
>
> Unless we change the law, an employer can now provide disability income protection benefits for cosmetic surgery but not provide such benefits to women whose genuine disability is pregnancy related.

Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources ("*Senate Hearings*"), 95th Cong., 1st Sess. 26 (1977) (prepared statement of Senator Kennedy). *See also Senate Hearings* at 7 ("the legislation would require that disability based on pregnancy, childbirth, or related medical conditions be treated as any other disability under a company plan") (statement of Senator Bayh).

Similarly, Representative Hawkins, the floor manager of the bill in the House, stated:

> [E]mployers . . . must treat pregnant women as they treat other employes similar in their ability, or inability, to work. This means, for example, that if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs.[33]

Finally, and perhaps most significantly, the committee reports and the other legislative history of the PDA make clear that Congress' goal in adopting the PDA was "approval of the views of the dissenters in *Gilbert*." [34] Yet neither of those dissents favored a comparison between pregnant women and male employees. Quite the contrary. Justice Brennan at the outside of his opinion made clear that his dispute with the majority concerned whether "a private employer can adopt a disability plan that compensates employees for all temporary disabilities except one affecting exclusively women, pregnancy." *Gilbert*, 429 U.S. at 146. Similarly, Justice Stevens stated that his disagreement with the majority related to the employer's treatment of pregnancy "differently from any other kind of absence . . . ." *Id.* at 161. Senator Javits confirmed that this was the Congressional reading of *Gilbert*:

> We do not want pregnancy discriminated against, as contrasted with a broken leg or a strep throat or appendicitis or some other basis for disability.

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[33] 123 Cong. Rec. 10,582 (1977) (introductory remarks of Representative Hawkins).

[34] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 n.6 (1987). *See also House Report* at 2 ("[i]t is the Committee's view that the dissenting justices correctly interpreted the Act"); *Senate Report* at 2 (the two dissenting opinions "correctly express both the principle and meaning of Title VII").

> That was the basis of the decision of the U.S. Supreme Court in the Gilbert case—to wit, that we in the Congress had not covered that point with respect to pregnancy. So now we are covering it.[35]

Thus, while Congress intended to bar distinctions based on pregnancy or related medical conditions that were arbitrary or stereotypical, the legislation was clearly not intended to foreclose differentiation based on equal treatment of similarly situated employees. In order to constitute a violation of the PDA's prohibition of disparate treatment, a plaintiff must compare the employer's treatment of women affected by pregnancy with the employer's treatment of employees who have other disabilities but are similar in their ability or inability to work.

C. The PDA Does Not Foreclose Consideration of Employee and Fetal Health.

Petitioners, as well as Judge Easterbrook in his dissent below (Pet. App. 74a), urge that even if the second clause of the PDA is viewed as establishing the relevant standard, this Court should look only at an employee's bare ability to do a job's functional tasks, without regard to the risks—no matter how serious—of congenital birth defects to children born to an employee exposed to toxic substances. Pet. Br. 31-33. Contrary to these suggestions, Congress did not confine the PDA's notion of "ability or inability to work" solely to the question of whether an employee could perform a job. Employee health and the risk of birth defects were a central ingredient of "ability to work" under the statute. If they were not, employers could refuse to give pregnant employees disability leave and other benefits based on the facile argument that their "ability to work" had not been impaired by their pregnancy, only their health or that of their offspring.

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[35] 123 Cong. Rec. 29,654 (1977).

While Congress did not focus specifically on risks associated with exposure of pregnant women to hazardous substances,[36] Congress was concerned with women who were "not able to work for medical reasons" (*Senate Report* at 4), and the interest in the health of a woman's offspring constituted a primary Congressional concern in passing the PDA. Senator Kennedy, a member of the committee reporting out the Senate bill, stressed the importance of the PDA in addressing the concern that a pregnant woman might feel compelled to risk harm to her unborn child by continuing to work in order to continue to receive benefits:

> There will be tens of millions of expectant mothers who will have to make that choice [between surrendering benefits or continuing to work]. That is bad health care policy; it is bad for the mother; it is bad for the child. You have the statistics here in terms of the incidences of mental retardation, infant mortality, child complications either from prematurity or from other factors.[37]

Clarence Mitchell, Director of the Washington Bureau of the NAACP and Chairman of the Leadership Conference on Civil Rights, also expressed such concerns:

> We want children not only to be born but we want them to be well born. We want mothers not to be restrained from carrying on that wonderful function of producing a fellow human simply because the future is uncertain and they don't know whether they would get the kind of benefits that people might get for getting an injury on the golf course.[38]

Patricia K. Putman, Associate Dean for Legal and Legislative Affairs, School of Medicine of the University of Hawaii, Honolulu, also emphasized the interests of the child who will be carried to term:

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[36] *See infra* n.40.

[37] *Senate Hearings* at 24. Senator Kennedy apparently was speaking of the costs associated with denying disability income payments to women who take time off because of pregnancy. *See Senate Hearings* at 26 (prepared statement of Senator Kennedy).

[38] *Id.* at 110.

> [P]roviding this kind of equality for women is not only a benefit to those women but also to their children, to their families, *and to the child that they may be bearing and will give birth to.* So it is not just for women alone.[39]

Thus, a primary purpose of the legislation was to protect fetal health. It would be anomalous in the extreme to construe such legislation to require employers to employ women in hazardous occupations that unquestionably jeopardized such health. There is not the slightest indication that Congress intended the PDA to have that effect so long as women were treated equally with similarly situated employees.[40]

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[39] *Id.* at 370 (emphasis added). To be sure, as petitioners point out (Pet. Br. 19), the legislative history also expresses concern that women might lose benefits and income if they were arbitrarily excluded from employment based on the fact of pregnancy. But this concern is perfectly consistent with a Congressional solution that required that women be treated equally with similarly situated employees.

[40] Relying on snippets of legislative history, *amici* Equal Rights Advocates, *et al.*, urge this Court to conclude that Congress consciously prohibited fetal protection policies when it enacted the PDA. Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 4-13. While the legislative history of the PDA reflects extensive concern with fetal health, it "is virtually void of any testimony or debate on the problem of exposing pregnant women to toxic work environments." Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1975 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 77-78 (1980).

Amici Equal Rights Advocates, *et al.*, rely on two vague statements by Senator Hatch, a congressional opponent of the PDA, and the only member of Congress even to advert to the issue, and one paragraph of the written submission of *amicus*, the Chamber of Commerce of the United States, which also opposed the legislation. Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 4-5.

Senator Hatch had the following exchange with Dr. Andre E. Hellegers:

> Senator Hatch. Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?
>
> [Continued]

D. This Court's Decisions Confirm That the PDA Requires a Comparison of Pregnant Women and Similarly Situated Employees.

Since its enactment in 1978, this Court has applied the PDA in two cases, both of which support our view of the Amendment. *Newport News Shipbuilding & Dry*

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[40] [Continued]

> Dr. Hellegers. Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that.

Senate Hearings at 67. Later that day Senator Hatch made a passing reference to "OSHA problems" in the course of a dialogue with Clarence Mitchell, Director of the Washington Bureau of the NAACP and Chairman of the Leadership Conference on Civil Rights:

> There are many problems that might arise in this. It is a complicated area.
>
> If we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should. *Senate Hearings* at 109-10.

Senator Hatch's statements are entirely consistent with the PDA as enacted. The effect of the bill was to prohibit the employer from treating pregnant women differently from other employees similarly situated, as Dr. Helleger's comments appear to suggest. Senator Hatch certainly did not suggest that under the bill every employer must routinely employ pregnant women regardless of the hazards of the job.

G. Brockwel Heylin, the representative of the Chamber of Commerce, stated in his testimony that the bill "would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child" and that the employer "would be powerless to deny the work to the child's mother during the pregnancy." *Legisla-*

Dock Co. v. EEOC, 462 U.S. 669 (1983), involved a male employee's § 703(a)(1) challenge to a company's health insurance plan. Although the company's plan provided female employees the same hospitalization coverage for pregnancy-related conditions as it provided for their other medical conditions, it provided less extensive coverage for pregnancy-related conditions of the spouses of male employees. The employer argued that the sole purpose of the PDA was to protect female employees and that male employees could not claim its protection to invalidate discriminatory treatment against their spouses. This Court rejected that argument, finding that the PDA overruled *Gilbert's* rationale, not just its narrow holding relating to benefits provided to pregnant employees. While this Court thus held that "[t]he meaning of the first clause [of the PDA] is not limited

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tion to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 84 (1977). *See also Senate Hearings* at 482.

The Chamber's comments could hardly have been meant to suggest that in all circumstances the employer was "powerless" to protect employee and fetal health. Employers remained obligated under the OSH Act to do so in many circumstances, and empowered to do so at least when the BFOQ standard was satisfied. The Chamber's comments, like Senator Hatch's, were intended to suggest only that the employer's power was circumscribed by the requirement of similar treatment, not that the power was entirely eliminated. In any event, no member of Congress expressed agreement with the Chamber's views.

Congress's failure to "indicate any disagreement" (Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 11) with a lone witness' view of the possible implications of the PDA, without more, can hardly be deemed to indicate Congressional acceptance of that view. Even comments by Congressional opponents of legislation are not a reliable guide to Congressional intent. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976). Given the importance, and salience, of the societal interest in preventing birth defects (*see supra* pp. 3-7), it is inconceivable that Congress would have consciously acted to prohibit employer fetal protection efforts in such an off-handed, unconsidered manner.

by the specific language of the second clause" and that the statute protects male as well as female employees (*Newport News*, 462 U.S. at 678 n.14), it is the second clause and not the first "which explains the application of the general principle to [pregnant] women employees."[41] *Id.* at 676.

In *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), this Court's second decision interpreting the PDA, the Court held that the PDA did not pre-empt a California state statute requiring employers to grant employees disabled by pregnancy, but not by other conditions, qualified rights of reinstatement following disability leave. The Court made clear that the second clause of the PDA states the governing standard. It then held, in effect, that the second clause of the PDA protected pregnant employees and their spouses from disparate treatment but did not protect other employees with similar disabilities from discriminatory treatment viv-a-vis pregnant employees. The Court stressed again the amendment's purpose in overruling both the holding and the rationale of *Gilbert*:

> By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert* . . . [T]he second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination *against pregnancy* is to be remedied.[42]

Neither *Newport News* nor *Guerra* held or implied that distinctions based on pregnancy do not require a comparison with similarly situated employees. Both recognized that the standard for the protection of employees who were pregnant or who had a related medical condition was equality of treatment with those simi-

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[41] The employer had argued that the PDA's reference in its second clause to individuals' "ability or inability to work" limited the PDA's application to female *employees*, and, therefore, the PDA afforded no protection to *non-employee spouses*. 462 U.S. at 679.

[42] 479 U.S. at 284-85 (emphasis added; citations omitted).

larly situated. Under that standard, as discussed in Part IV below, it is clear that the employer's policy here did not violate the PDA.

III. THE OCCUPATIONAL SAFETY AND HEALTH ACT SUPPORTS AN INTERPRETATION OF THE PDA THAT WOULD PRESERVE EMPLOYER POLICIES TO PREVENT BIRTH DEFECTS.

A. The OSH Act Encourages Employers to Institute Voluntary Programs to Protect the Health of Their Employees and Their Employees' Unborn Children.

Even if the language and legislative history of the PDA were less clear, the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651 *et seq.* (1988)) ("OSH Act")) supports a construction of the PDA that would permit employers to maintain non-discriminatory policies designed to protect employee and fetal health.

The OSH Act is designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). Even petitioners concede, as they must, that the protections of the OSH Act extend to the "reproductive health of workers, including the health of the children they bear." [43]

To achieve this goal, the OSH Act requires, among other things, the Secretary of Labor to promulgate health and safety standards. 29 U.S.C. § 655(a), (b). A related purpose of the OSH Act is to encourage employers to institute, voluntarily, health and safety programs providing greater protection than that mandated by the Secretary's standards. Thus, the statute's purposes and policy are to be accomplished, in part:

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[43] Pet. Br. 41 (citing 29 U.S.C. § 655(b) and *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981)). *See also* 43 Fed. Reg. 52,959 (1978) ("OSHA asserts that damage to the fetus represents impairment of the reproductive capacity of the parent and must be considered material impairment of functional capacity under the OSH Act.").

> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions; [and]
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> * * * *
>
> (4) by building upon advances already made through employer . . . initiative for providing safe and healthful working conditions[.] [44]

The legislative history of the OSH Act underscores the concern of Congress that the statute encourage employers to take voluntary initiatives to improve workplace health and safety. The legislative history is replete with references to employers that were providing innovative and effective health and safety programs at the time the OSH Act was under consideration.[45] Senator Saxbe, in a written statement introduced before the Senate, spoke of "the fundamental judgment that what is needed is comprehensive Federal legislation which would . . . take advantage of and encourage further private initiative to assure safe and healthful employment." 116 Cong. Rec. 35,607 (1970)[46].

Since passage of the OSH Act, the Department of Labor's Occupational Safety and Health Administration ("OSHA") has implemented this statutory purpose by providing for Voluntary Protection Programs.[47] Under

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[44] 29 U.S.C. § 651(b)(1), (4).

[45] *See, e.g.*, 116 Cong. Rec. 36,512 (1970) (statement of Senator Saxbe) (noting that safety protections are given "prime attention" by larger employers); 116 Cong. Rec. 38,704 (1970) (statement of Representative Sikes) (noting that "[s]ome employers have demonstrated an outstanding degree of concern for the health and safety of their employees").

[46] *See also* 116 Cong. Rec. 36,512 (1970) (statement of Senator Saxbe).

[47] Notice of Implementation of Revised Voluntary Protection Programs ("Notice"), 47 Fed. Reg. 29,025 (1982).

the Voluntary Protection Programs, OSHA will remove from scheduled inspections those employers that comply with certain safety and health standards "*which go beyond OSHA standards in providing safe and healthful workplaces for their employees, and which want to do more than is required to help the agency accomplish the goals of the Act.*" Notice, 47 Fed. Reg. 29,025 (1982) (emphasis added). *See also* Clarifications to the Voluntary Protection Programs ("Clarifications"), 53 Fed. Reg. 26,339, 26,341-42 (1988). These programs "not only ensure that OSHA's standards are met, but go beyond the standards to provide the best feasible protection at [the] site."[48]

The Voluntary Protection Programs rest on a variety of fundamental and unassailable policy considerations. These include OSHA's "long [recognition] that compliance with its standards cannot . . . itself accomplish all the goals established by the Act. The standards, no matter how carefully conceived and properly developed, will never cover all unsafe activities and conditions." Clarifications at 26,341. In addition, these programs are necessary because "limited resources will never permit regular or exhaustive inspections of all of the Nation's workplaces." *Id.* Finally, OSHA recognizes that "employers and employees, because of their day-to-day experience in the workplace, *acquire a special knowledge of the processes, materials and hazards* involved with the job. This knowledge, combined with the ability to evaluate and address unique hazards quickly and to provide rewards for positive action, can be used by employers to improve workplace safety and health in ways simply not available to OSHA." *Id.* (emphasis added).

Ironically, in this case, the employer is being faulted for having used its "special knowledge of the processes,

[48] Clarifications at 26,341. The OSH Act, although encouraging voluntary action, does not require employers to institute such programs. *But cf. International Union, UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987) (obligations under general duty clause).

materials and hazards involved" in working with lead as the basis for taking voluntary action to protect its employees and their unborn children. Yet this is precisely the kind of voluntary effort that the OSH Act encourages, and without which the cause of improving employee safety and health would surely suffer.

Petitioners' reliance on OSHA's 1978 lead standard in support of their position (Pet. Br. 2-3, 41-42) is thus entirely misplaced. OSHA's failure to establish a separate, lower exposure level for women simply means that, under the OSH Act, companies do not violate the statute by employing fertile women in jobs involving exposure to lead within the limits set by the standard. The OSHA lead standard manifestly did not, as urged by petitioners (Pet. Br. 41-42), preclude the adoption of policies that would achieve greater protection from birth defects than that required by law.

Given the well-documented hazards associated with exposure to lead, it is particularly appropriate that employers take voluntary action to provide a greater level of protection for lead-exposed employees than that required by the lead standard. Indeed, the lead standard encourages employers to take voluntary action to protect against birth defects caused by congenital lead poisoning. It gives employers "broad flexibility" to manage fetal health risks posed by exposure of fertile women to lead. 29 C.F.R. § 1910.1025, App. C, at 182 (1989). The standard provides that physician-recommended safety practices "may be more stringent than the specific provisions of the standard." *Id.*

In short, if an employer, like the employer in this case, determines in good faith that an OSHA standard does not provide an appropriate level of protection, the OSH Act encourages that employer to provide additional protection. The purpose of the statute would not be served if employers were required to stand by and wait for OSHA to promulgate a new standard, rather than to act to prevent injury and illness based on their knowledge of their own workplaces.

B. Principles Of Statutory Construction Require the Court to Interpret the PDA in the Light of the OSH Act.

In passing the PDA in 1978, Congress did not intend to undermine fundamental purposes of the OSH Act, enacted nearly eight years earlier. Nothing in the language or legislative history of the PDA suggests that it prevents employers from voluntarily adopting policies designed to prevent birth defects; as we have discussed, such policies are entirely consistent with the purposes of the PDA. Under established principles of statutory construction, this Court should not construe the PDA to vitiate the policies of the OSH Act.

This Court has recognized, in many contexts, that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." [49] As this Court noted in the *Regional Rail Reorganization Act Cases*:

> "A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. . . . Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end . . . ." [50]

[49] *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984) (Federal Insecticide, Fungicide, and Rodenticide Act did not repeal by implication the Tucker Act); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (Wildlife Refuge Revenue Sharing Act did not partially repeal by implication the earlier Mineral Leasing Act; Court noted: "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." (citation omitted)); *FAA v. Robertson*, 422 U.S. 255, 265-67 (1975) (Freedom of Information Act did not repeal by implication non-disclosure provisions of the Federal Aviation Act). *Cf. Tidewater Oil Co. v. United States*, 409 U.S. 151, 164-65 (1972) (28 U.S.C. § 1292(b) did not affect this Court's jurisdiction under the Expediting Act).

It is particularly significant that, in *Morton v. Mancari*, 417 U.S. 535 (1974), this Court adopted this approach with regard to Title VII. *Morton* involved the question of whether the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-16(a) (1988) ("EEOA")), which amended Title VII, impliedly repealed Section 12 of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. § 472 (1988) ("Section 12")), a provision that broadly authorized a policy of preferential hiring of Native Americans in the Bureau of Indian Affairs. The agency had implemented the policy and incorporated it into its programs for many years. Shortly after the EEOA made Title VII applicable to federal employment, the preference was challenged on the ground that it was inconsistent with, and repealed by, the EEOA. This Court refused to find that the EEOA impliedly repealed Section 12, even though "the words of the [EEOA], if taken literally, would have worked a repeal of an Indian preference policy . . . ." *Watt v. Alaska*, 451 U.S. 259, 281 (1981) (citing *Morton*).

The Court in *Morton* noted two factors, among others, which made the case "prototypical" for construing the statutes harmoniously. Each of these factors applies here. First, in *Morton*, applying Title VII to bar the preference would contravene a "longstanding, important component" of the prior legislation. 417 U.S. at 550. So here, the OSH Act's policy of encouraging employer initiatives constitutes a "longstanding, important component" of that statute. Second, this Court in *Morton* recognized that Title VII was not intended to deal with the problems addressed by the earlier Indian preference legislation. *Id.* Here, as well, Congress did not intend the

[50] 419 U.S. 102, 134 (1974) (quoting with approval *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 943 (Regional Rail Reorg. Ct. 1984)).

PDA to bar voluntary employer programs to protect the health of their employees.

Under these circumstances, this Court should construe the PDA to permit voluntary employer programs to protect employees and their offspring as long as those programs afford equal treatment to all employees whose exposure to toxic substances poses substantially similar risks to fetal health.

IV. PETITIONERS HAVE FAILED TO SHOW THAT THE EMPLOYER'S FETAL PROTECTION POLICY VIOLATED THE PDA.

Petitioners have not met their burden of establishing that the employer's policy at issue here fails the test of equality. There can be no question that plaintiffs here bear the threshold burden of establishing disparate treatment.[51]

To establish a prima facie case of disparate treatment in this case, petitioners had to show that (a) the employer's policy was pretextual, or (b) that it was arbitrary, or (c) that it treated fertile women differently than other workers whose employment posed the same substantial risk of birth defects. This petitioners failed to do.

---

[51] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Petitioners concede they have the initial burden of establishing disparate treatment. Pet. Br. at 14.

This Court's decision in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1789 (1989), contains references to two other Court of Appeals decisions that considered fetal protection policies (*Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1548 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982)), as having appropriately placed the burden of proof regarding the business necessity defense on the employer. *Price Waterhouse* does not alter the general rule that the burden of proof to establish disparate treatment is on the plaintiff; it holds only that where prohibited discrimination plays an admitted role, the burden to show that other factors were determinative lies with the employer.

Petitioners do not suggest that the employer's policy here is pretextual. Nor can petitioners establish that the policy is arbitrary, in light of the well-established hazards of lead exposure. For example, the OSHA rulemaking hearings on the lead standard concluded that "[t]he evidence describing adverse effects from lead exposure to the fetus and newborn was uncontroverted . . . . There was, in fact, virtually no debate on the issue of whether the fetus and newborn are at risk from exposure to lead." 43 Fed. Reg. 54,398 (1978). As the Court of Appeals found here, "overwhelming medical and scientific research data demonstrate a substantial risk to the unborn child from lead" through exposure of female employees. Pet. App. 32a. Petitioners concede that "there was no dispute among the experts" on the risk posed by employing women. Pet. Br. 5.

In both courts below, petitioners' efforts "have primarily been devoted" to the third of these questions, namely, to showing a comparable risk of birth defects through exposure of male workers to lead. Pet. App. 33a. Had petitioners been successful in those efforts, they would have established the disparate treatment of similarly situated employees necessary to satisfy their initial burden under the PDA. But petitioners were not successful. The Court of Appeals found petitioners' evidence, "at best, speculative and unconvincing." Pet. App. 34a.[52]

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[52] In light of the rulemaking record underlying OSHA's 1978 lead standard, it is difficult to understand OSHA's observation that the evidence regarding lead exposure does not "create a basis for exclusion from work of any person, male or female, who is capable of procreating." 43 Fed. Reg. 54,398 (1978). The danger through exposure of women was admitted (*see* 43 Fed. Reg. 52,959 (1978)), and the danger through exposure of men was not proved.

OSHA recognized that there was a "dearth of this type of research" on the effects on men (*id.* at 54,392), and relied principally upon Dr. Ioana Lañcranjan's examination of 150 lead-exposed male Romanian battery workers as indicating strong male risks. *Id.* at 54,389. However, the Lancranjan study was limited to analyzing the effects of lead exposure on male fertility and did not focus at all on the fetal effects of such exposure. The study "engendered

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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much criticism during the lead hearings." *Id.* at 54,392. OSHA recognized that the Lancranjan study had been criticized and that "[i]t would be impossible without further research to eliminate all questions associated with the study." *Id.* at 54,393. Because the study did not even address the fetal effects of lead exposure, it provides no basis at all for an employer to ignore, for example, the CDC's conclusion in 1985 that "the OSHA standard is probably not sufficiently strict to protect the fetus." JA 184.

In its review of challenges to the lead standard, the District of Columbia Circuit found OSHA's position regarding the fertility risks to men of lead exposure to be supported by substantial evidence (*United Steelworkers v. Marshall*, 647 F.2d at 1258). This hardly suggests, much less requires, a finding that the employer's contrary conclusion here was arbitrary.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.

Respondent.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Concerned Women for America, ("CWA") is a national, non-profit organization representing approximately 600,000 people. CWA's purpose is as follows:

> To preserve, protect and promote traditional Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

CWA is concerned with the unwarranted employment discrimination against women, as well as the health and well-being of children, both born and unborn. The child protection policy at issue in this case is very important in an industry which has demonstrated ill-effects on unborn children due to prenatal exposure to lead. CWA believes that Title VII of the Civil Rights Act of 1964 was broadly enacted to proscribe discrimination in employment, but that it is not so broad as to prohibit employers from adopting policies which protect unborn children from work-place hazards. Based upon the record in this case, Concerned Women for America supports the child protection policy at issue and urges this Court to affirm the ruling of the Seventh Circuit Court of Appeals. 886 F.2d 871 (7th Cir. 1989).

ARGUMENT

I. EMPLOYER POLICIES WHICH PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS, BUT APPLY DIFFERENTLY TO WOMEN THAN MEN, ARE CONSISTENT WITH TITLE VII

At issue in this case is whether under Title VII of the Civil Rights Act of 1964 an employer may adopt a policy which protects unborn children from birth defects due to workplace hazards when the policy treats women differently from men. Child protection policies like the one in

this case do not violate Title VII because, as the legislative history indicates, they are not the type of employer decisions, that the legislation was enacted to prohibit.

A. Title VII Prohibits Only "Arbitrary And Unnecessary" Discrimination, And Not All Differential Treatment Of People.

Title VII of the Civil Rights Act of 1964,[1] did not prohibit all discrimination in employment but was enacted to remove "artificial, arbitrary, and unnecessary barriers to employment . . . ." *Dothard* v. *Rawlinson*, 433 U.S. 321, 328 (1977). Title VII prohibits discrimination "because of" or "on the basis of sex." The legislative history is virtually silent as to what Congress meant by this language, because "sex" was added as a protected category late in the congressional deliberations and the amendment was passed without any hearings.[2] Consequently, what "sex discrimination" was prohibited is not absolutely clear and it has fallen to the courts to give this language meaning. This Court has determined that employment decisions distinguishing between men and

[1] 42 U.S.C. § 2000e-2, § 703 (a)(1) reads:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[2] It is generally known that "sex discrimination" was added late in the deliberations by an opponent of the bill in an effort to defeat the legislation. 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith); *id.* at 2581-82 (remarks of Rep. Green). *See Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 74 n.54 (1980).

women will be prohibited under Title VII if they are based on stereotyped characterizations of men and women.

> [E]mployment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. [Citation omitted]. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702, 707 (1978); *see also Dothard* v. *Rawlinson*, 433 U.S. 321 ("the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, . . .") *Id.* at 333-34.

Pregnancy Discrimination Act ("PDA")

Similarly, in 1978, when Congress passed the Pregnancy Discrimination Act ("PDA") clarifying the meaning of sex discrimination as including discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions,"[3] the overwhelming purpose of the legislation was to prohibit employment discrimination based on stereotyped characterizations of women because of pregnancy—the assumption that merely because women bear children they are marginal workers.[4] In

[3] 42 U.S.C. § 2000e (k), § 701(k).

[4] "As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R.Rep. No. 948, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 4749, 4751.

"The assumption that women will become pregnant and leave the labor market is at the core of the stereotyping resulting in unfavorable disparate treatment of women in the workplace." 123 Cong. Rec. 29662 (daily ed. Sept. 15, 1977) (statement of Senator Cranston).

enacting the PDA, Congress was concerned that women not be penalized for becoming pregnant and not lose their jobs simply because an employer thought a pregnant woman could not, or would not, perform the job.

The vast majority of the PDA's legislative history is given to the discussion of 1) overturning this Court's decision in *General Elec. Co.* v. *Gilbert*,[5] where the Court found that denying fringe benefits to pregnant women did not constitute sex discrimination in violation of Title VII, 2) the cost to the employer of implementing this legislation, and 3) whether abortion must be paid for as a "medical related condition."[6] The thrust of the PDA was to ensure that a pregnant women's benefits were equal to those of her co-workers, so that employers could not use benefit plans as instruments to force women out of the workplace because of the employer's stereotyped belief that women were marginal workers.[7]

---

[5] 429 U.S. 125 (1976). The references to *Gilbert* in the legislative history are extensive. *See Prenatal Exposure to Fetally Toxic Work Environments*, 66 Iowa L.-Rev. at 79 n. 76 (1980, *citing* legislative history); *see also, Newport News Shipbuilding & Dry Dock* v. *EEOC*, 462 U.S. 669, 678 (1983).

[6] The PDA does not require an employer to provide health insurance benefits for abortion except "where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e (k). If, under the PDA, an employer is able to consider the unborn child in the circumstance of abortion, how much more so, in a policy that protects the unborn child from birth defects after it is born.

[7] "The purpose of the bill is to insure that women who are disabled by conditions related to pregnancy are compensated fairly and given a fair amount of assistance with their medical bills, in relation to their fellow employees who are disabled by other medical conditions." 123 Cong. Rec. 29386 (daily ed. Sept. 15, 1977) (statement by Senator Williams, sponsor of the Bill).

"We can set right the injustice of unequal health protection for male and female employees by passing S. 995. This amends Section 701 of the Civil Rights Act of 1964 by providing that employers who offer disability benefits must offer them to cover pregnancies." 123 Cong. Rec. 29388 (daily ed. Sept. 15, 1977) (statement of Sen. Kennedy, co-sponsor of the Bill).

[8] Br. of Equal Rights Advocates, et al., at 1.

Title VII, as amended by the PDA, was meant to address the general problem of prohibiting women from the work force because of myth or negative stereotypes, and was never intended to have any effect on an employer's decision to adopt policies which would protect unborn children from workplace hazards.

Toxic Workplaces

Some of the amici have wrongly posited that Congress was "fully informed" that the PDA would prohibit a policy of refusing work to a pregnant woman because of the risk either to her or her child and that Congress "enacted the PDA without change and with full understanding of its reach."[8] In light of the vast hearing record and legislative history on the PDA dealing with health benefits and generalized discrimination against women, this conclusion is unwarranted.

While the legislative history indicates that some mention was made of employers' concerns about toxic workplaces, these passing references must be put in perspective. Subcommittees of the House and the Senate held hearings over a five day period, compiling over 1000 pages of statements and testimonies, not including the hundreds of pages of legislative history created outside of the hearings. Of nearly 1200 pages of deliberation on this

bill, there were two references to the effects of a toxic work environment on pregnant women and their children.

The United States Chamber of Commerce made the first reference in a prepared statement submitted to both the House and Senate Committees. The Chamber of Commerce interpreted the PDA to prevent employers from refusing work to pregnant employees where such work, "*arguably*" posed a threat to the health of either the woman or her unborn child.[9] While that may be true, that is not the case before this Court. The threat posed to the unborn child by prenatal exposure to lead is definite. The court of appeals found "overwhelming evidence . . . that an unborn child's exposure to lead creates a substantial health risk involving the danger of permanent harm." *International Union, UAW* v. *Johnson Controls*, 886

[9] The Chamber of Commerce statement reads in part:

> S.995 could present job health problems. For example, it requires that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes." This would prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat to the health of either the mother-to-be or her unborn child. Even though the prospective mother might arguably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 482 (1977) [hereinafter "Senate Hearings on S. 995"]; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84 (1977) [hereinafter "House Hearings on H.R. 5055 and H.R. 6075"]. A representative for the Chamber of Commerce gave oral testimony to the same effect at the House hearings.

F.2d 871, 883 (7th Cir. 1989). If the threat posed to the unborn child is arguable, then a policy protecting the child may be unnecessary and might violate the PDA. But a threat that is definite makes the policy necessary and is not proscribed by the PDA.

The only other reference was in a brief exchange between Senator Hatch and an expert witness testifying before the Senate Subcommittee. The witness basically encouraged that more research be conducted on the effects of industry hazards to all employees and their unborn children, and not just to women.[10]

Out of nearly 1200 pages of statements, testimony and legislative history, these two references appeared on a total of four pages.[11] Four pages of 1200. It can hardly be said that Congress was "fully informed" or even on notice that the reach of the PDA might prohibit an employer from adopting policies which protect unborn children from hazardous workplaces.

[10] SENATOR HATCH: Do you think there would arise a whole slew of OSHA problems occupational, safety and health problems as a result of pregnant women?

> DR. HELLEGRES: Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries, and the effects on fetuses, all three, and we aren't doing much of that.

Senate Hearings on S. 995, at 67.

[11] *Senate Hearings on S. 995*, at 67, 482; *House Hearings on H.R. 5055 and H.R. 6075*, at 84, 88.

B. Employer Policies Which Protect Unborn Children From Birth Defects Are Not Arbitrary Or Unnecessary In Manufacturing Processes Which Expose Women To Airborne Lead.

Title VII, as amended by the PDA, struck at the negative stereotype that women were marginal workers who would leave the work force simply because they could have children. These beliefs potentially kept women out of *all* jobs. It is this fact that illuminates why the application of the child protection policy in this case does not violate Title VII.

First, it is not a policy which seeks, because of myth or stereotype, to keep women out of the work place or in low paying jobs. The purpose of the policy is to protect unborn children from the very real and documented effects of prenatal exposure to lead. The lower court found after reviewing the record that "overwhelming evidence . . . establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm." *Johnson Controls*, 886 F.2d at 883. That unborn children are affected by in utero exposure to lead is a medically-proven fact.

It is also a fact that, as this Court has stated, "[t]here is a natural difference between men and women: only women have the capacity to bear children." *Hodgson* v. *Minnesota*, 58 U.S.L.W. 4957, 4961 (U.S. June 26, 1990). In the area of constitutional law, this Court has "consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (upholding California statutory rape law under which men alone may be criminally liable for an act of sexual intercourse).

This Court also upheld a federal statute which subjected male naval officers who were not promoted within a

certain period of time, to mandatory discharge while not subjecting female naval officers who were not promoted within the same period to discharge. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975)[12] ("In contrast [to cases where gender classifications were based on overbroad generalizations], the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that the male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.* at 507-08. There are real differences between men and women and these differences do not simply disappear because a case is brought under Title VII. The policy at issue in this case focuses on this "natural difference" between men and women. There is no myth; there is no stereotyping.

Second, this policy does not preclude women from working in *all* jobs, but only those which expose their unborn children and future children to the industry dangers.[13] We acknowledge that there are and will be jobs

[12] *See also*, *Parham* v. *Hughes*, 441 U.S. 347 (1979) (opinion, Stewart, J. "In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situation, this court has upheld its validity.") *Id.* at 354-55.

[13] Johnson Controls' child protection policy prevents women who are capable of bearing children from working in jobs where there is a likelihood that their blood lead levels will rise above 30 ug/dl. *See Johnson Controls*, 886 F.2d at 876.

Initially, the child protection policy applied to jobs in "lines of progression" which contained high-risk positions. But it has been noted in *Respondent's Brief in Opposition*, that after the case went to the Seventh Circuit, Johnson Controls revised its policy eliminating the "lines of progression" provision. The policy is now applied even more narrowly, on an individual job-by-job basis. *Id.* at 8 n. 16.

It should also be noted that Johnson Controls revised its policy from 30 to 25 micrograms in accord with the Center for Disease Control's current maximum lead level for umbilical cord blood. *Id.*

closed to women because of the child protection policies,[14] but that fact does not end the inquiry.

Title VII is a balancing of interests, and the standard adopted by the federal courts of appeals and the EEOC (*see* p. 21, *infra*), correctly weighs the competing interests. If no evidence sustains the employer's policy, then in Judge Posner's words, "I do not see why we should want to save it from condemnation under Title VII." *Johnson Controls*, 886 F.2d at 904 (Posner, J., dissenting). But on the other hand, if sufficient evidence sustains the employer's policy, and both the District Court and the Court of Appeals found it so, the policy should be upheld. The child protection policy at issue in this case is not artificial, arbitrary, or unnecessary. It is not based on myth or stereotype and does not violate Title VII.

II. EMPLOYER POLICIES WHICH PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS, BUT APPLY DIFFERENTLY TO WOMEN THAN MEN, SATISFY THE TITLE VII EXCEPTION FOR BONA FIDE OCCUPATIONAL QUALIFICATIONS

Not only are child protection policies consistent with the purpose of Title VII to prohibit artificial, arbitrary or unnecessary discrimination, but they also satisfy the Title VII exception to employment discrimination. Title VII prohibits discrimination in employment that is artificial, arbitrary or unnecessary, but recognizes that in some situations specific classifications will be appropriate. Employers are therefore provided with an exception to

[14] *See Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641 (1981) (noting that "at least 100,000 jobs are closed to women because of policies barring fertile women from hazardous jobs.") *Id.* at 647.

classifications based on sex, religion or national origin when the classification is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2 (e).

Even though the federal courts of appeals and the EEOC have varied on the defense applicable in cases involving gender-based child protection policies (some apply a business necessity/disparate impact standard while others require a BFOQ standard), all have come to the same conclusion that child protection policies are permitted under Title VII.[15]

When this Court has addressed gender classifications under Title VII, it has applied the BFOQ defense. *See Dothard*, 433 U.S. 321 (1977) (regulation prohibiting women from working in contact positions at all-male prison); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (policy barring women with school-aged children from employment). But this Court has also noted that "Congress recognized that classification based on . . . sex . . ., may sometimes serve as a necessary proxy for neu-

[15] *International Union, UAW* v. *Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc) (employer's policy sustained under either business necessity or BFOQ defense); *Hayes* v. *Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (business necessity defense); *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) (business necessity defense); *Policy Statement on Reproductive and Fetal Hazards Under Title VII*, *reprinted in* Fair Empl. Prac. Manual (BNA) (Oct. 3, 1988) (recognizing a per se violation of VII but applying business necessity defense). The Commission's position changed in *Policy Guide on United Auto Workers* v. *Johnson Controls*, *reprinted in* Fair Empl. Prac. Manual (BNA) (Jan. 24, 1990) to require a BFOQ defense while maintaining the same elements of the former business defense.

tral employment qualifications essential to the employer's business." *Western Air Lines, Inc.*, v. *Criswell*, 472 U.S. 400, 411 (1985).

The BFOQ defense has been narrowly construed, *Dothard*, 433 U.S. at 334, but it is not so narrow as to preclude employers, in their "normal operations," from considering anything but their products, or anyone but their immediate employees.

> The other key words of the defense, "normal operation" should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded . . . . To confine the occupational qualification defense to concerns with price and product quality would deny a defense to Johnson Controls even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries. . . .

Johnson Controls, 886 F.2d at 903-04. (Posner, J., dissenting).

A. Consideration Of The Interests Of Third Parties Is Permissible In BFOQ Analysis.

This Court has frequently considered the interests of third parties when utilizing the BFOQ defense. *See Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (considering the safety of the inmates and other personnel in upholding a state regulation barring the hiring of women guards for "contact positions" at the all-male prisons). In *Dothard*, this Court stated that "more is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment . . ." *Id.* at 335. What "more" was at stake was "the basic control of the penitentiary and *protection of its inmates and the other security personnel.*" *Id.* at 336 (emphasis added). *See also Western*

Air Lines v. *Criswell*, 472 U.S. 400 (1985) (considering the safety interest of the flying public in assessing the airline's age 60 retirement requirement for flight engineers).

It has been argued that child protection policies cannot come under the BFOQ defense because these policies do not address the employee's "ability or inability to perform the work."[16] Such a narrow reading is not correct. Not only did the lower court find that child protection policies could come within the BFOQ defense,[17] but two of the dissenters in the case also agreed that these policies and the employer's concern for the interests of third parties would be within the "normal operations" of the business.

> The [BFOQ] defense is applicable to this case and although it is of limited scope it is not the proverbial eye of a needle. In particular the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties. An employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees.

Johnson Controls, 886 F.2d 871, 904 (Posner, J., dissenting).

> [T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making.

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[16] *Johnson Controls*, 886 F.2d at 909. (Easterbrook, J., dissenting).

[17] *Id.* at 893.

Id. at 901-2, n.1 (Cudahy, J., dissenting). The EEOC also concurred with that opinion.[18]

Employers must be able to take the safety interests of third parties into consideration as being "reasonably necessary to the normal operations." If in the present situation employers in a hazardous industry could not consider the safety of an unborn child as part of their normal operation, then, as Judge Posner states:

> To confine the occupational qualification defense to concerns with price and product quality would deny a defense to [the employer] even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries.

886 F.2d at 903-04 (Posner, J., dissenting). The ironic outcome would then be that the PDA which was enacted to help shield unborn children by providing suitable work and income for their mothers, would be used as a sword against the children by allowing them to be exposed to toxic hazards. This simply would not be consistent with society's and the government's stated interest in protecting unborn children.

B. Increasing Recognition Of the Interests Of Unborn Children Regarding Birth Defects And Life Itself, By Society And Government, Justifies Consideration Of Those Interests By Employers In Voluntarily Considering Workplace Qualifications.

This Court has consistently recognized the State's "strong interest in protecting the potential life of the

[18] EEOC *Policy Guide*, at 405:6801 (Jan. 24, 1990).

fetus." *Maher* v. *Roe*, 432 U.S. 464, 478 (1977),[19] and it would be a strange anomaly that, as society and the law increasingly recognize the interests of unborn children, an employer would be precluded from doing the same. Not only is there widespread demand for more adequate legal protection of unborn life, and more latitude from this Court for that legal protection by states, but property, tort, criminal and other branches of law are giving more protection to unborn life.

Early on the interests of unborn children were recognized in the areas of property[20] and inheritance.[21] Increasingly, the interests of unborn children are being recognized and protected. Before 1946, tort law rarely allowed recovery for a child who was injured in utero and was subsequently born alive.[22] One of the reasons was that "the defendant could owe no duty of conduct to a person who was not in existence at the time of the inju-

[19] *See also Webster* v. *Reproductive Health Services*, 492 U.S. ____, 106 L.Ed 2d 410, 434 109 S. Ct. ____ (1989); *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 770 (1986); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 428 (1983); *Harris* v. *McRae*, 448 U.S. 297, 313 (1980).

[20] The Restatement (Second) of Property § 1.4 comment d (1983) states:

> d. *Vesting of interest in child in gestation.* A child in gestation who is later born alive is considered a life in being during the period of gestation in determining whether such child's interest in property meets the vesting requirement of the rule against perpetuities.

[21] The Uniform Probate Code § 2-108 (1969) states:

> Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

[22] *See* W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts*, § 55, 367 (5th Ed. 1984).

rious action."[23] But now a legal duty to the unborn child is increasingly acknowledged. In every jurisdiction a child, if born alive, can maintain an action for the consequences of prenatal injuries, and a wrongful death claim will lie if the child subsequently dies of the injuries.[24] Further, courts are increasingly allowing actions where the harmful contact with the mother occurs before the child's conception.[25]

While many of the prenatal and preconception injury causes of action turn on whether the child is born alive, a majority of states now allow wrongful death claims by the estates of children who died before birth,[26] thereby

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[23] *Id.*, (*citing*, *Dietrich* v. *Inhabitants of Northampton*, 138 Mass. 14, 17 (1884)).

[24] *Prosser and Keeton on the Law of Torts*, at 368. *See also* Exodus 21:22.

[25] *See Bergstresser* v. *Mitchell*, 577 F.2d 22 (8th Cir. 1978) (courts of Missouri would permit an infant born alive to bring an action for injuries arising out of preconception negligent conduct); *Jorgensen* v. *Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973) (chromosomal damages to mother's ovum from taking a defective drug); *Renslow* v. *Mennonite Hospital*, 67 Ill.2d 348, 10 Ill.Dec. 484 367 N.E.2d 1250 (1977) (infant can maintain action for injuries sustained as result of negligent transfusion even though it occurred several years before conception); *Enright* v. *Eli Lilly & Co.*, 155 App.Div.2d 64, 553 N.Y.S.2d 494 (1990); (cause of action will lie for granddaughter of woman who ingested DES during the pregnancy of the claimant's mother).

[26] *See Eich* v. *Town of Golf Shores*, 293 Ala. 95, 300 So.2d 354 (1974); *Summerfield* v. *Superior Court In and For Maricopa County*, 144 Ariz. 467, 698 P.2d 712 (1985); *Hatala* v. *Markiewicz*, 26 Conn.Supp. 358, 224 A.2d 406 (1966); *Worgan* v. *Greffo and Ferrara, Inc.*, 128 A.2d 557 (Del. Super. 1956); *Simmons* v. *Howard Univ.*, 323 F.Supp. 529 (D.D.C. 1971); *Porter* v. *Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Chrisafogeorgis* v. *Brandenberg*, 55 Ill.2d 368, 304

clearly indicating that the child's interest arises and becomes valid *before* birth.

Similar advances are underway in criminal law, as more states consider fetuses as "persons" under their homicide statutes.[27]

As society and the courts increasingly recognize the interests of unborn children, it would be unjust not to permit employers to do the same. Tort law has acknowledged that employers have a legal duty to unborn chil-

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N.E.2d 88 (1973); *Britt* v. *Sears*, 150 Ind.App. 487, 277 N.E.2d 20 (1972); *Hale* v. *Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell* v. *Couch*, 285 S.W.2d 901 (Ky. 1955); *Wascom* v. *American Indemnity Corp.*, 383 So.2d 1037 (La.App.1980); *Odham* v. *Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone* v. *Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill* v. *Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes* v. *Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey* v. *Horn*, 221 Miss. 269, 72 So.2d 434 (1954); *O'Grady* v. *Brown*, 654 S.W.2d 904 (Mo. 1983); *White* v. *Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin* v. *MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar* v. *St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (1980); *Hopkins* v. *McBane*, 359 N.W.2d 862 (N.D. 1984); *Werling* v. *Sandy*, 17 Ohio St.3d 45, 476 N.E.2d 1053 (1985); *Evans* v. *Olson*, 550 P.2d 924 (Okl. 1976); *Libbee* v. *Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Amadio* v. *Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley* v. *Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler* v. *Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Vaillancourt* v. *Medical Center Hosp of Vt. Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen* v. *Hanson*, 85 Wash.2d 597, 537 P.2d 266 (1975); *Baldwin* v. *Butcher*, 155 W.Va. 431, 184 S.E.2d 428 (1971).

[27] *See* Cal. Penal Code § 187 (West Supp. 1986); Ill. Ann. Stat. ch. 38, § 9-1.2 (Smith-Hurd Supp. 1990); Iowa Code Ann. § 707.7 (West 1979); Mich. Comp. Laws Ann. § 750.322 (West 1968); Miss. Code Ann. § 97-3-37 (1973); N.H. Rev. Stat. Ann. § 585:13 (1974); Okla. State Ann. title 21, § 713 (West 1983); Utah Code Ann. § 76-5-201 (Supp. 1989); Wash. Rev. Code Ann. § 9A32.060 (1988); Wisc. Stat. Ann § 940.04 (West 1982).

dren, and, while it is the rule that economic factors may not alone justify a BFOQ defense, as the Government points out in its brief" "[t]he existence of a reasonably perceived legal obligation is distinct from a justification resting solely on economic or solely on moral concerns." Government Br. at 16-17 n. 13.

C. Policies Which Protect Unborn Children From Birth Defects Are BFOQs, Particularly When Reduction Of Employer Liability Is Involved.

Title VII may not allow a cost justification defense for a discriminatory policy, *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 716 (1978), but this cannot preclude employers from considering the effect their product or its production may have on third parties as one of many factors in making business decisions which are "reasonably necessary to the normal operations of the particular business." Judge Posner has warned in his dissent that "[w]e should not dismiss the concerns over tort liability as a narrow, selfish bottom line concern irrelevant to the purposes of Title VII." *Johnson Controls*, 886 F.2d at 905 (Posner, J., dissenting). He went on to say that the potential tort liability was an estimation of the cost to the child for suffering the prenatal injury and "[t]hat is a social cost that Title VII does not require a company to ignore." *Id.*

As society's interest in the unborn child and the child's interest itself is increasingly recognized in the legal field (*see* p. 14, *supra*), employers must be able to consider what effect future liability may take. To do otherwise would be to place the employer in a position whereby, ignoring the growing legal duty to the child, employers open themselves up to litigation in the future, and as Judge Posner explained:

> Such a suit would not be preempted by worker's compensation law because the plaintiff would not be the worker. The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability [cites omitted]. It would merely make the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.

Johnson Controls, 886 F.2d at 904-05 (Posner, J., dissenting).

At least one suit of this nature has been tried. *See Security National Bank* v. *Chloride, Inc.*, 603 F.Supp. 294 (D.Kan. 1985) (Child sued battery manufacturer for prenatal injuries due to lead exposure). In the *Chloride* case, the child lost, but the fact is, with every jurisdiction allowing causes of action for prenatal injuries, the potential liability is there. As a society we must encourage offensive rather than defensive measures, stopping damage before it occurs rather than recalling products and defending tort litigations after the fact.

Taking this offensive is difficult in the present situation because of the balancing of the competing interests involved. The course is a difficult one to chart but the courts of appeals which have been faced with the challenge have created a test which adequately balances all of the interests involved and assures that the policy is narrowly tailored to infringe on the fewest rights. (p. 21, *infra*.)

III. THE FEDERAL COURTS OF APPEALS THAT HAVE ADDRESSED EMPLOYER POLICIES THAT PROTECT UNBORN CHILDREN FROM BIRTH DEFECTS HAVE FOUND THE POLICIES CONSISTENT WITH TITLE VII

With the infinite variety of factual situations Title VII cases can have, this Court has consistently urged a flexible approach to interpreting Title VII cases. *See Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575-77 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).[28] As both the Fourth Circuit and the EEOC have recognized, child protection policies do not fall squarely within the Title VII framework and therefore require a flexibility in the application of the Title VII theories.

> We must start by conceding that the fact situation [the child protection policy] presents does not fit with absolute precision into any of the developed theories . . . . That there would be such fact situations in Title VII litigation has always been recognized by the Supreme Court as it has developed and applied the different theories. The Court has continually admonished, [cites omitted] and indeed demonstrated in its own decisions, [cites omitted] that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that will emerge in Title VII litigation.

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[28] *See also Western Air Lines* v. *Criswell* where this Court explained the need for a flexible approach to the application of the BFOQ under the ADEA.

> The diverse employment situations in various industries, however, forced Congress to adopt a "case-by-case basis . . . as the underlying rule in the administration of the legislation." [Cite omitted]. *Congress offered only general guidance on when an age classification might be permissible by borrowing a concept and statutory language [BFOQ defense] from Title VII of the Civil Rights Act of 1964.*

Id. 472 U.S. at 411-12 (emphasis added).

Wright v. *Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982).

> These cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves.

EEOC, *Policy Statement* at 405:6615 n.11 (Oct. 3, 1988).

Various federal courts of appeals and the EEOC have addressed the issue of child protection policies and their relation to Title VII, all concluding that these policies are permitted under Title VII.[29] Though the courts differ in their analyses, the elements or questions are basically the same:

1) That there is a substantial risk of harm to the employees' offspring through workplace exposure to toxic hazards;

2) the transmission of that harm to offspring is confined substantially to employees of one sex; and

3) there are no adequate but less discriminatory alternatives to the employer's policy.[30]

These elements appropriately balance the interests of all parties involved—the employer, the employee and the unborn and future offspring. The courts have consistently required that proof of the risk to the unborn and proof that the risk is transmitted through one parent be objective.

> The employer must produce objective evidence of an essentially scientific nature supported by the opinion evidence of qualified experts in the relevant scientific fields. The employer need not prove the existence of a general consensus on the points within the qualified

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[29] *See* n. 13, *supra*.

[30] *Wright*, 697 F.2d at 1190-92; *Hayes*, 726 F.2d at 1548, 1552-53; *Johnson Controls*, 886 F.2d at 885; EEOC *Policy Guide*, at 405:6802 (Jan. 24, 1990).

> scientific community. Rather, the employer carries its burden by showing that the body of opinion believing that significant risk exists is so considerable that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

Hayes v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548 (1984) (citing *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1191, 1196 (1982)). Using this formulation, the lower court found that:

> [t]he overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure, found in the record and set forth in Section II, *supra*, approaches a general consensus within the qualified scientific community, and certainly suffices to show that within that community there is a considerable body of opinion that significant risk exists.

Johnson Controls, 886 F.2d at 889.[31]

With regard to the evidence that the risk is substantially transmitted through women, the lower court found that "the evidence of risk to the unborn child resulting from exposure of the father to the lead levels currently present in the Johnson Control's battery manufacturing factories is, at best, speculative and unconvincing." *Id.* There has been much criticism of the medical community because the research on lead exposure has focused on women and the effects on their offspring, while ignoring the effects of lead exposure on the male reproductive system and the effects it might have on the male's offspring.[32] This lack of research should not, however, lead us to ignore the clear evidence of the effect on unborn children that comes from direct maternal exposure to lead merely because it might lead to differential treatment in the workplace. Instead, the logic of the *Hayes* court should be adopted.

> In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women. As additional research on men becomes available, however, the employer must adjust the policy or risk running afoul of Title VII.

Hayes, 726 F.2d at 1549.

CONCLUSION

Based on the record, this Court should affirm the decision of the Seventh Circuit Court of Appeals, granting summary judgment to Johnson Controls and upholding its policy which protects unborn children from birth defects. The child protection policy in this case is not artificial, arbitrary or unnecessary. It narrowly applies only to those jobs which would expose women, their unborn and future children to lead levels that have been clearly shown to cause damage to the unborn child. This type of policy does not violate Title VII as it is based upon objective medical evidence, not myths or stereotypes.

The policy is also consistent with society's and the legal system's increasing awareness and recognition of the interests of unborn children. It has been said that "justice requires that the principle be recognized that a child has

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[31] In addition, the parties in this case agree that there is a substantial risk to the unborn child from exposure to lead. *See Johnson Controls*, 886 F.2d at 879 (*citing* the appellate briefs of the UAW and Johnson Controls).

[32] *Firing the Woman to Protect the Fetus:*, 69 Geo. L.Rev. at 661; *Hayes*, 726 F.2d at 1549.

the legal right to begin life with a sound mind and body."[33] Child protection policies analyzed under the standard created and used by the Courts of Appeals and endorsed by the EEOC will do just that, while at the same time protecting women from arbitrary application of child protection policies in other industries where no proof of danger has been shown.

Date: July 19, 1990

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[33] *Smith* v. *Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

(20)

No. 89-1215

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE RESPONDENT

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC) and the National Association of Manufacturers of the United States of America (NAM) respectfully submit this brief amici curiae. Letters of consent on behalf of both parties have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.

INTEREST OF THE AMICI CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employ-

ment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical, as well as the legal, aspects of equal employment policies and requirements. The members of EEAC are committed firmly to the principles of nondiscrimination and equal employment opportunity.

NAM is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers, and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in workplace safety and health issues, as well as the proper interpretation of civil rights legislation.

The members of EEAC and NAM, and the constituents of their association members, are employers subject to various employment and labor laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* In addition, many of the EEAC and NAM member companies manufacture or process goods that involve chemicals or substances that have the potential to harm an unborn fetus. As a result, some companies have adopted fetal protection policies, much like the policy adopted by Johnson Controls in the instant case. Thus, EEAC and NAM have a direct interest in the issue presented for the Court's consideration herein, that is, whether Title VII permits an employer to have a fetal protection policy that excludes women of childbearing capacity (but not men) from jobs involving high levels of lead, when lead exposure poses a risk for a fetus, and when the qualified medical evidence shows that that risk is passed through women only.

Because of its interest in Title VII and the burden of establishing and defending a case of employment discrimination, EEAC has filed amicus briefs with this Court in a number of cases, including *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Similarly, EEAC filed briefs in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), and *Long v. State of Florida*, 108 S. Ct. 2354 (1988), cases involving the use of sex-based actuarial tables.

Moreover, because of its concern about the dangers of workplace hazards and the propriety of fetal protection policies, EEAC filed a brief in *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), a case upholding an employer's fetal protection policy under circumstances similar to those presented herein. Similarly, NAM has been active in many civil rights and workplace safety cases before this Court, including *Asta v. Illinois*, 110 S.Ct. 52 (1989); *Manufacturers Association of Tri-County v. Knepper*, 484 U.S. 815 (1987); and *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986).

Thus, because of their significant experience, EEAC and NAM are uniquely situated to brief this court on the relevant concerns of the business community and, in accord with Supreme Court Rule 37, the importance of this case beyond that brought to this Court's attention by the parties.

STATEMENT OF THE CASE

In 1982, Johnson Controls implemented a policy excluding women capable of bearing children from working in jobs in the company's battery manufacturing plants, where the women would be exposed to high levels of lead. Although the company based its policy on medical evidence indicating that the risk to the fetus is passed through women only, the United Auto Workers (UAW) filed suit alleging that Johnson Controls' policy violated Title VII. The trial judge granted the company's motion for summary judgment, noting that Johnson Controls properly had justified its policy based on scientific evidence showing that there exists substantial risk of fetal harm through exposure to lead, that the risk is borne only by women and not by men, and that the company's fetal protection policy is effective in eliminating that risk of harm. Significantly, the UAW failed to present any evidence challenging the scientific basis for Johnson Controls' policy—or indicating that there was an acceptable alternative policy that would have a lesser discriminatory impact. Indeed, the UAW admitted that there was a substantial risk of harm to the fetus from lead exposure.

The Seventh Circuit upheld the district court's grant of summary judgment, holding that Johnson Controls' fetal protection policy was justifiable under either of two distinct Title VII theories of proof: the disparate impact/business necessity test, or the disparate treatment/bona fide occupational qualification (BFOQ) test. Significantly, in doing so, the court viewed as irrelevant whether Johnson Controls or the UAW maintained the burden of persuasion under these theories, since the company was entitled to summary judgment in any event.

Insofar as it applied a disparate impact/business necessity test, the Seventh Circuit followed the lead of the only other cases in the courts of appeals that had addressed fetal protection policies—*Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), and *Hayes v. Shelby*

Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984)—and indeed adopted the analytical framework that had been posited at the time by the Equal Employment Opportunity Commission. *See Policy Statement on Reproductive and Fetal Hazards Under Title VII*, Equal Employment Opportunity Commission, Fair Empl. Prac. Man. (BNA) 401:6613 (Oct. 3, 1988), *revised* Jan. 24, 1990. In doing so, the court followed *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989), in which this Court ruled that the plaintiff maintains the burden of persuasion throughout in a disparate impact/business necessity case.

Having determined that Johnson Controls' policy was valid under the business necessity test, the court further ruled that the company could avail itself of the BFOQ defense. The court reasoned that concern about industrial safety is a legitimate part of the essence of Johnson Controls' business operations. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 896 (7th Cir. 1989). Because the risk of fetal harm is inherent in the normal operation of the company's business, its fetal protection plan is "reasonably necessary" to further the interest in industrial safety—and to exclude employees from that business operation on the basis of sex—since the risk of harm is "substantially confined" to women only. Therefore, according to the court, sex becomes a BFOQ for jobs in the manufacture of lead batteries, making Johnson Controls' fetal protection policy valid under Title VII. The dissenting judges argued that the BFOQ, not the business necessity, test should apply when analyzing fetal protection policies.

SUMMARY OF ARGUMENT

This Court has, over the years, recognized various theories under which plaintiffs can allege, and employers can defend, claims of Title VII discrimination. For purposes of examining Johnson Controls' fetal protection policy, however, it makes little difference which theory is used, since this Court recently clarified in *Wards Cove*, 109 S.Ct. 2115, that the plaintiff retains the burden of persuasion throughout the course of the litigation, and that, generally speaking, the employer has a burden merely of producing a business justification for its challenged policy. Indeed, the EEOC and the three courts of appeals that have considered fetal policies—the Fourth, Eleventh and the Seventh below—all have adopted similar analytical elements of proof.

A proper application of settled Title VII principles thus incorporates these common elements and focuses upon an employer's business justification for its policy—including the employer's concern for the safety of fetuses and other "third parties." *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). Specifically, an employer may defend its policy by introducing evidence: 1) that there exists a substantial risk of fetal harm; 2) that, based on available evidence, the risk of transmitting such harm is substantially confined to employees of one sex; and 3) that its policy is reasonably necessary to the normal operation of its business—with due consideration of the safety interests of the fetus, the company and society. This standard, like Johnson Controls' policy itself, does not generalize against women but, rather encourages individualized determinations.

While an employer may defend by making this three-part showing, the plaintiff has the burden of persuasion throughout the case. *Wards Cove*, 109 S.Ct. at 2126. Thus, the plaintiff has the obligation to create an evidentiary record, to establish a *prima facie* case, to rebut the employer's showing, and to establish an equally effective, but less discriminatory alternative. Of course, as noted in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978), any alternative to the employer's chosen solution must be approached cautiously, since courts are "generally less competent than employers to restructure business practices." *See Wards Cove*, 109 S.Ct. at 2127.

ARGUMENT

I. REGARDLESS OF WHICH DISCRIMINATION THEORY A PLAINTIFF USES TO CHALLENGE A FETAL PROTECTION POLICY, TITLE VII PERMITS A COMPANY TO DEFEND ITS POLICY BY PRODUCING A LEGITIMATE BUSINESS JUSTIFICATION.

A. The Various Theories This Court Has Recognized For Proving And Defending Discrimination Claims Have, To A Large Extent After *Wards Cove v. Atonio*, Merged And Now Concentrate Upon An Employer's Production Of A Business Justification.

Over the years, this Court has adopted various theories under which plaintiffs can prove, and employers can defend, claims of Title VII discrimination. The Court's decision last term in *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), however, harmonized these theories by making it clear that, no matter which approach is used, a plaintiff retains the burden of establishing a claim of discrimination throughout the course of the litigation, and an employer has the burden merely of producing a business justification for its challenged policy.

The first discrimination theory, disparate treatment, is concerned with those situations in which an employer intentionally "treats some people less favorably than others because of race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). To establish a *prima facie* case, the plaintiff must satisfy the four requirements established by this Court in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792, 802 (1973),[1] or otherwise produce evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358 (1977).

Disparate impact, on the other hand, concerns specific "practices, procedures or tests," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), "that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another," *Teamsters*, 431 U.S. at 335 n.15. While proof of discriminatory motive is not required, *id.*, to establish a *prima facie* case under the impact theory, the plaintiff must identify a specific employment practice that is challenged and show that it has caused a significantly discriminatory impact. *Wards Cove*, 109 S.Ct. at 2125. Thus, although the two methods of establishing a case are different in their focus on an employer's intent, they are similar to the extent that they both require a substantial level of initial proof from the plaintiff.

In addition, it is now clear that the two theories are similar with regard to the employer's burden on rebuttal. Once the plaintiff makes an initial showing under the disparate impact theory, the employer must produce or articulate "evidence of a business justification for his employment practice." *Wards Cove*, 109 S.Ct. at 2126. This is essentially the same as the employer's long-established burden under the disparate treatment theory, which is not to *prove*, but rather to produce or "*articulate* some legitimate, nondiscriminatory reason" for a challenged action, *McDonnell Douglas*, 411 U.S. at 802 (emphasis added). *See Furnco Construction Corp. v. Waters*, 438

[1] *McDonnell Douglas* requires the plaintiff to show "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

U.S. 567, 577 (1978). Even where an employer defends a disparate treatment case by establishing a bona fide occupational qualification (BFOQ),[2] according to the Seventh Circuit below, it is essential that an employer produce a business reason for its behavior. 886 F.2d at 894 ("[BFOQ] concerns are in many ways quite similar to those a court should address in a business necessity defense analysis").[3] For an employer under each of these rebuttal theories, therefore, production of a business justification is key.

Most importantly, there is no doubt since *Wards Cove* that both theories require the plaintiff to carry the burden of persuasion throughout. Justice White, in the majority opinion in *Wards Cove*, explained:

> The burden of persuasion, however, remains with the disparate-impact plaintiff. . . . "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Watson* [*v. Fort Worth Bank & Trust Co.*], 487 U.S., at —, 108 S.Ct. at 2790 (O'CONNOR, J.) (emphasis added). *This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.* See *Texas Dept. of*

[2] The BFOQ defense, found at 42 U.S.C. § 2000e-2(e), permits sex discrimination where it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. . . ."

[3] *See Chambers v. Omaha Girls Clubs, Inc.*, 834 F.2d 697, 704 (8th Cir. 1987) ("[T]he district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq 'is similar to and overlaps with the judicially created 'business necessity' test.'").

Community Affairs v. Burdine, 450 U.S. 248, 256-258 (1981).

109 S.Ct. 2126 (emphasis added). Indeed, in his dissenting opinion in *Wards Cove*, Justice Stevens (joined by Justices Brennan, Marshall and Blackmun) noted that the "majority's opinion blurs [the] distinction" between the disparate impact and the disparate treatment theories for purposes of an employer's burden of proof. *Id.* at 2130.[1]

It is clear, therefore, that the various theories of proof under Title VII involve, to a large degree, the same fundamental elements: all require a plaintiff to maintain the burden of persuasion throughout, and, significantly, require an employer merely to produce a legitimate business justification for its policy. As we now show, the various standards that courts and the EEOC have adopted for analyzing fetal protection policies fit well within this now-settled Title VII framework.

[1] In fact, as the Seventh Circuit below properly noted, these enumerated theories are not rigid—but are intended to be flexible depending upon the facts presented. 886 F.2d at 883. For example, this Court stated that the four *McDonnell Douglas* requirements are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. Indeed, in *Teamsters*, 431 U.S. 324, this Court called for a rule in analyzing different factual situations that is not inflexible. *See Wright v. Olin*, 697 F.2d 1172, 1186 n.21 (4th Cir. 1982) ("While the loose equation—overt discrimination/b.f.o.q. only defense—is . . . properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine").

B. Three Courts Of Appeals And The EEOC Have Advanced Standards For Analyzing Fetal Protection Policies That Contain Common Elements Of Proof Concentrating Upon The Employer's Business Justification.

In *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), the Fourth Circuit held that employer fetal protection policies, such as the one at issue herein, are permissible. In doing so, the court used a modified disparate impact theory,[5] and adopted a standard requiring the employer to demonstrate that:

> [1] significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, [2] that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and [3] that its program of restriction is effective for the purpose.

697 F.2d at 1190 (footnote omitted). Even so, the Fourth Circuit permitted a plaintiff to rebut this showing with "proof that there are 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish it equally well with a lesser differential . . . impact [between women and men workers].'" *Id.* at 1191, *quoting Robinson v. Lorillard*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

Similarly, the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984), discussed the firing of a pregnant hospital x-ray technician

[5] Although the court conceded that the disparate impact theory normally is applied only in cases in which an employer's policy is "facially neutral," such a dispute over which theory to use "would involve mere semantic quibbling having no relevance to the underlying principle that gave rise to this theory." 697 F.2d at 1186.

after unsuccessfully attempting to find her alternative work. In doing so, the Eleventh Circuit, like the Fourth, adopted a modified disparate impact standard, reasoning that the hospital's policy is facially neutral in the sense that it "equally protects the offspring of all employees." *Id.* at 1552. Again, in examining the employer's business reasons for its policy, the court used a standard it saw as "identical" to that announced by the Fourth Circuit in *Olin*:

> [T]he employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men.

726 F.2d at 1548 and n.8. As in *Olin*, "the employer's business necessity defense may be rebutted by proof that there are acceptable alternative policies that would better accomplish the purposes . . . with a less adverse impact on one sex." *Id.* at 1553.[6]

Endorsing the burden of proof model established in *Olin* and *Hayes*, the EEOC in 1988 issued its *Policy Statement on Reproductive and Fetal Hazards Under*

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[6] *Hayes* declined to adopt *Olin*'s description of the employer's showing as "business necessity," but the substantive requirements of what an employer has to show are nonetheless "identical." 726 F.2d at 1548 n.8. As properly noted by the Seventh Circuit below:

> Although *Olin* and *Hayes* represent somewhat different analyses, both cases, in essence, determine that a business necessity defense in a fetal protection policy case requires (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women. Both cases also allow the employee to present evidence of less discriminatory alternatives equally capable of preventing the health hazard to the unborn.

886 F.2d at 885.

Title VII. The Policy stated that the issues in a fetal protection case are:

> (1) whether there exists a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive or fetal hazard in the workplace; (2) whether the harm to employees' offspring takes place through the exposure of employees of one sex but not employees of the opposite sex; and (3) whether the employer's policy effectively eliminates the risk of fetal or reproductive harm. Even if these elements are proved, the policy will not withstand scrutiny if it is shown that there exists a reasonable alternative policy that will protect employees' offspring from fetal or reproductive harm and that has a less discriminatory impact on employees of the restricted sex.

Policy Statement, reprinted in Fair Empl. Prac. Man. (BNA) at 405:6615 (hereinafter cited as "1988 Policy Statement") (footnotes omitted).[7] Even in its 1990 *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, the EEOC noted that the "pertinent questions" under either the "BFOQ or the 'business necessity' analysis" are the same. *Id.* at 9, *reprinted in* Pet. App. 127a-144a.[8]

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[7] The Statement asserted that fetal protection "cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." Even so, the agency viewed "business necessity" as the appropriate defense.

The EEOC explained that "an employer's reproductive or fetal protection policy must be neutrally designed to protect all employees' offspring from hazards existing in the workplace. Where substantial evidence exists that the risk of harm to employees' offspring takes place only through the exposure of one sex to a hazard existing in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards." *Policy Statement*, Fair Empl. Prac. Man. at 405:6615-6616.

[8] Under the new EEOC standard, an employer must establish a BFOQ, and not mere business necessity. Nonetheless, the factors

Still another court of appeals—the Seventh Circuit below—agreed "that the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." 886 F.2d at 886. The Seventh Circuit stated:

> The requirement of a [1] substantial health risk to the unborn child effectively distinguishes between the legitimate risk of harm to health and safety which Title VII permits employers to consider and the "[m]yths or purely habitual assumptions" . . . that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities. Likewise, the requirement that the [2] risk of harm to offspring be substantially confined to female employees means that a fetal protection policy applying only to women recognizes the basic physical fact of human reproduction, that only women are capable of bearing children. Finally, the employee's option of presenting [3] less discriminatory alternatives to a fetal protection policy assures that these policies are only as restrictive as necessary to prevent the serious risk of harm to the unborn child.

Id. at 886-87 (footnote omitted). Indeed, the inquiry is similar under the Seventh Circuit's BFOQ standard in the sense that the focus is upon an employer's business justification for its exclusion. As the Seventh Circuit stated, the "concerns" under the BFOQ defense analysis "are in many ways quite similar to those a court should address in a business necessity defense analysis." 886 F.2d at 894. Even where the BFOQ focus is on what is "reasonably necessary' to an employer's "normal operation" of its "particular business," the inquiry is the same —an employer's concern for the safety of its workers and of third parties.

Accordingly, it is clear that all fetal protection policy standards that have been adopted by the courts and the EEOC contain common elements. From a policy viewpoint, it certainly makes no sense to subject a fetus or other third party to the vagaries of various standards depending upon the jurisdiction. To the contrary—as we now show, this Court should annunciate a uniform standard incorporating these common elements, but one that does not read safety concerns out of Title VII.

II. TITLE VII DOES NOT LIMIT LEGITIMATE BUSINESS JUSTIFICATIONS SOLELY TO FACTORS AFFECTING AN EMPLOYEE'S ABILITY TO "PERFORM THE JOB"; RATHER, IT PERMITS EMPLOYERS TO CONSIDER THE LEGITIMATE SAFETY INTERESTS OF EMPLOYEES AND THIRD PARTIES.

The UAW and its amici argue that an employer's fetal protection policy constitutes intentional discrimination against women and, as such, can be defended only under the BFOQ model.[9] They argue, however, that an em-

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are mostly the same under both theories. Under the new standard, in addition to showing "substantial risk" (here conceded by the UAW) and transmission of the risk through women only (fully credited by the Seventh Circuit below), an employer must show that its policy "minimizes the risk while excluding the narrowest possible group." *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, Equal Employment Opportunity Commission (January 24, 1990), at 9. The plaintiff may still show that there are reasonable alternatives which are less onerous to women," which, as shown fully below, the UAW failed to do in the present case.

The primary difference between the old and new standards, according to the EEOC and the Government in their amicus brief, is that the employer maintains the burden of establishing a BFOQ, while the plaintiff keeps the burden of persuasion in a business necessity case throughout. Brief for the United States and the Equal Employment Opportunity Commission Supporting Petitioners at 15. As we show below, however, an employer ought to be able to meet its burden with identical criteria regardless of the theory.

[9] EEAC and NAM adopt the contrary view that because Johnson Controls' fetal protection policy equally protects the offspring of

ployer can never prevail under this BFOQ theory, because it cannot be shown that such a policy is related to a worker's ability to perform his or her job "efficiently and proficiently." *See* Petitioner's Brief at 29-34 (here-

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all employees, and thus is not discriminatory on its face, that it is, accordingly, supportable under the traditional disparate impact/business necessity model.

First, this case clearly can be viewed under the disparate impact model because the same two elements are present herein that were present in *Hayes*: namely that Johnson Controls has shown 1) that its policy "is justified on a scientific basis" and 2) that "it is not necessary to protect the offspring of male employees" in the same manner. 726 F.2d at 1552. Upon this proof, according to *Hayes*, "the employer has shown that its policy is neutral, in the sense that it *equally protects the offspring of all employees*." *Id.* (emphasis added). Indeed, this analytical view has been adopted by all appellate courts that have considered the issue. *See Johnson Controls*, 886 F.2d at 886 ("We agree with the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case.").

Second, it is clear that Johnson Controls has in fact established a business necessity defense since it has "produce[d] evidence of a business justification for [its] employment practice." 886 F.2d at 887, *citing Wards Cove*, 108 S. Ct. at 2126.

Third, the UAW has failed to present facts sufficient to persuade a court that Johnson Controls' business necessity defense cannot be factually supported—a burden which the UAW maintains at all times. *Wards Cove*, 109 S.Ct. at 2126. Specifically, as recognized by the Seventh Circuit below, the UAW failed to carry its burden of demonstrating that the risk of transmitting lead exposure to unborn children occurs through men as well as women. 886 F.2d at 890.

Just as importantly, the UAW failed to present adequate, but less discriminatory, alternatives to Johnson Controls' fetal protection policy. Indeed, the UAW failed in two ways: 1) it did not raise the issue in its brief to the Seventh Circuit, in violation of Rule 28(a)(4) of the Federal Rules of Appellate Procedure; and 2) even if it *had* raised the issue, the UAW did not meet its difficult burden under *Wards Cove* to present specific economically feasible alternatives, that are equally effective, and which equally further Johnson Controls' legitimate interests. 886 F.2d at 892, citing *Wards Cove* at 2126-2127.

inafter cited as "UAW Brief"). According to the UAW, an employer may consider only "production"—not the safety of its employees, third parties or the general public. UAW Brief at 29 n.27, 33; Brief of the National Organization of Women at 24.[10]

As fully explained elsewhere in this brief, EEAC and NAM submit that there is no valid basis in Title VII for such outcome-determinative constructions of the various discrimination theories. But regardless of what this standard is called, this Court should in no event sanction a requirement that considers "production" as the only legitimate business justification for a policy that affects employment opportunities. Rather, as properly recognized by the Seventh Circuit below, and as discussed more fully in the next section, Title VII permits an employer to consider legitimate safety concerns. Indeed, this Court has repeatedly recognized safety as a key inquiry—even under the BFOQ theory.

In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, this Court recognized as legitimate a prison's concern for the "*safe* and efficient job performance" of a woman applying for a job as correctional officer. *Id.* at 331 n.14 (emphasis added). More importantly, this Court noted that where, as here, "[m]ore is at stake" than the employee's own safety—*i.e.* the safety of third parties—an employer properly may consider more than whether the woman can do the job. *Id.* at 335-36. Indeed, this Court expressed its concern for third parties when it explained:

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[10] Indeed, two of the dissenters in *Johnson Controls* (Judges Easterbrook and Flaum) argue that the BFOQ standard applies herein. However, under their BFOQ analysis, in applying the BFOQ test to women, Johnson would be required to show that its policy is based on evidence that fertile women differ in their ability to perform the duties of the job, a test that could not involve considerations of safe job performance. We disagree with the dissenters by advocating more "flexibility," *see Furnco*, 438 U.S. at 577, for employers to establish a business justification.

> *The likelihood that inmates would assault a woman because she was a woman would pose a real threat* not only to the victim of the assault but also *to the basic control of the penitentiary and protection of its inmates and the other security personnel.* The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Id. at 336 (emphasis added).

Similarly, in *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court recognized that the City of New York Transit Authority's rule denying employment to methadone users "significantly serve[s]" the "legitimate employment goals of *safety* and efficiency." *Id.* at 587 n. 31 (emphasis added). According to this Court, the rule "bears a 'manifest relationship to the employment in question,'" both for safety-sensitive and non-safety-sensitive jobs. *Id.*, citing *Griggs*, 401 U.S. at 432.

Indeed, in *Western Air Lines v. Criswell*, 472 U.S. 400, 419 (1985), this Court addressed the BFOQ defense under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Significantly, while *Criswell* struck down the company's policy that required flight engineers to retire upon reaching age 60, it upheld a similar policy for pilots. In noting the interests of third parties under the BFOQ standard, this Court stated that an examination of an employer's job qualifications must "further the overriding interest in public safety," and indeed acknowledged that "Congress did not ignore the *public* interest in safety" when it "adopt[ed] that standard." *Id.* at 413 and 419 (emphasis added). *See also Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 1263 (6th Cir. 1981); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371-72 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Worthy v. U.S. Steel Corp.*, 616 F.2d 698 (3d Cir. 1980); *Friend v. Leidinger*, 588 F.2d 61, 65 (4th Cir. 1978); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972).

Thus, while the UAW argues that safety concerns are relevant only if related to "the individual's abilities to perform the assigned tasks," UAW Brief at 30, this Court said just the opposite in *Dothard*, *Beazer* and *Criswell*, and the courts of appeals have followed suit. Clearly, therefore, a proper interpretation of Title VII allows employers to consider safety concerns—even those of third parties, such as the fetuses herein. Accordingly, this Court should in no event adopt an analysis of the BFOQ defense that would not allow an employer to consider safety as a legitimate business consideration. As shown below, and further explained in Johnson Controls' brief, the appropriate issue is, in part, the safety of third parties.

III. UNDER A PROPER INTERPRETATION OF TITLE VII, AN EMPLOYER MAY DEFEND A FETAL PROTECTION POLICY BY INTRODUCING EVIDENCE THAT THERE EXISTS A SUBSTANTIAL RISK OF HARM, THAT THE RISK OF TRANSMITTING SUCH HARM IS SUBSTANTIALLY CONFINED TO EMPLOYEES OF ONE SEX, AND THAT ITS POLICY IS REASONABLY NECESSARY TO THE NORMAL, SAFE OPERATION OF ITS BUSINESS.

EEAC and NAM urge this Court, in affirming the decision of the Seventh Circuit below, to articulate a standard incorporating the common elements contained in the decisions discussed above. Specifically, the Court should make clear that Title VII permits an employer to defend its fetal protection policy by introducing evidence of the following: 1) that there exists a substantial risk of harm; 2) that the risk of transmitting such harm is substantially confined to employees of one sex; and 3) that its policy is reasonably necessary to the normal operation of its business—with due consideration of the safety of third parties.

This standard is explained more fully below.

A. Producing Evidence Regarding A Substantial Health Risk To The Unborn Child Through Workplace Exposure To Toxins.

As the first element of its business justification, an employer would ordinarily have to produce evidence regarding a substantial fetal health risk through workplace exposure. Here, that showing has been made, since, as properly recognized by the Seventh Circuit below, "[*b*]*oth* the UAW and Johnson Controls agree on appeal that the significant evidence of risks to the health of the fetus contained in the record establishes a *substantial* health risk to the unborn child." 886 F.2d at 888 (emphasis in original).[11]

In future cases, should a plaintiff not concede the existence of a risk, an employer ought to be able to meet its justification burden by producing scientific evidence that is supported by qualified expert opinion. *See Hayes*, 726 F.2d at 1548. In cases involving lead exposure, such a risk is clear. Indeed, even though it noted the UAW's concession in this regard, the Seventh Circuit went on to find that "overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure. . . approaches a 'general consensus within the qualified scientific community,' and certainly 'suffices to show that within that community there is [a]

[11] The UAW admitted in its brief to the Seventh Circuit at page 33 that "it is clear that . . . substantial risk of harm to the fetus . . . has been established." Likewise, Johnson Controls stated below that "[t]he evidence in the record on [substantial risk of harm to the fetus] is overwhelming." Johnson Controls Brief at 22. As the Seventh Circuit properly noted: "[i]n light of the parties' agreement on the question of substantial risk of harm to the unborn child, this issue is not before this court on appeal." 886 F.2d at 888. At this late stage, the UAW and its amici seek to recharacterize this risk as speculative. That recharacterization should not be allowed.

considerable body of opinion that significant risk exists.' " 886 F.2d at 888, *citing Olin*, 697 F.2d at 1191.

B. Reasonably Relying On Available Evidence That The Risk Of Transmission Of The Hazard Is Substantially Confined To Employees Of One Sex.

Under a proper reading of Title VII doctrine, the employer must also establish that the risk of transmitting the hazard is substantially confined to employees of one sex. Again, an employer should not have to *prove the existence* of a general consensus of opinion, but rather should only have to produce "scientific evidence" to support its position. *See Hayes*, 726 F.2d at 1548-54. Significantly, the employer should be able to carry its burden by showing that, based on "reasonable necessity," it is relying "on the best available scientific data." *Wright*, 697 F.2d at 1190 n.27. Such a standard fully comports even with the BFOQ standard and this Court's safety cases discussed in Section II above. *See Criswell*, 472 U.S. at 419 (employer need not be "certain[]" of the safety risk, just have a "credible basis in the record.").

The evidence presented by Johnson Controls herein certainly met this standard. Accordingly, the Seventh Circuit concluded:

> The evidence presented concerning the lingering effects of lead in a woman's body, combined with the magnitude of medical difficulties in detecting and diagnosing early pregnancy, lead us to agree with Johnson Controls that there exists a reasonable basis in fact to conclude that an extension of this policy to all fertile women is proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead.

886 F.2d at 898-99. This makes sense: lead is deposited in the mother's placenta and bones, and is passed to the fetus directly through blood flow or decalcification during pregnancy. *See* 886 F.2d at 879, 882.

In contrast, a male's exposure to lead can affect his offspring only if it causes genetic damage. All of the company's experts testified that male exposure below the OSHA standard (50 μg/dl) did not pose substantial risk to unborn children. Indeed, OSHA's own standards were inconclusive with regard to male exposure. *Id.* Moreover, as fully explained in the Respondent's Brief, the UAW offered rodent studies, which were not credited by the Seventh Circuit below, and its own experts in fact conceded that "male-mediated" risk is, at best, speculative.

This Court has always permitted a "gender classification [that] is not invidious, but rather realistically reflects that fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Where the evidence shows that lead is passed through the placenta and bone decalcification during pregnancy—a phenomenon not experienced by male workers—this Court should not hesitate to defer to an employer's "reasonably necessary" exclusion,[12] and should indeed adopt such a standard for future cases.

C. Showing That Its Policy Is Reasonably Necessary To The Normal Operation Of Its Business, With Due Concern for Industrial Safety.

An additional element of the employer's business justification will ordinarily be to produce evidence that its

[12] Johnson Controls adopted its fetal protection policy in response to a very real threat: at least six women had become pregnant while having excessive levels of lead in their blood. 886 F.2d at 876-77. This threat clearly is not one of the "[m]yths or purely habitually assumptions" about the "characteristics of males or females." *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978), and, according to the Seventh Circuit below, "the convincing scientific evidence of this risk and the very serious consequences of this danger combine to make this health risk quite different from the concerns in *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908), which we would currently characterize as stereotypical rather than real." 886 F.2d at 898.

fetal protection policy is "reasonably necessary to the normal operation" of its business—an element that includes the consideration of legitimate safety factors. This may be viewed as very similar to a BFOQ showing,[13] which permits an employer to consider the consequences of its inaction on its workers, third parties and society in general. As shown above, this Court has approved employers' consideration of the safety of third parties in previous decisions, and it should similarly recognize here that Title VII permits such consideration as part of the "normal operation" of a particular business. As the Seventh Circuit properly noted:

> At a broad level, Johnson's business, insofar as relevant to this case, is the manufacture of batteries. Johnson's business is "unique" because it requires the use of lead, an extremely toxic substance that has been scientifically established to pose very serious dangers to young children and, in particular, to the offspring of female employees. *In order to respond to the problems accompanying its unique battery manufacturing operation, Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible. This safety interest is every bit as critical to the mission of Johnson's battery manufacturing business as rehabilitation of prisoners is to the mission of the prison facility at issue in [other cases].* Furthermore, like the prison in [other cases], Johnson has found it necessary to "innovate" to achieve its essential goal of manufacturing batteries safely through the adoption of a fetal protection policy that would address the health/safety problems related to its female employees significantly more effectively than the alternative policies it had considered.

[13] As shown in Johnson Controls' brief, the BFOQ defense is properly applied to fetal protection policies, and has consistently been interpreted to allow employers to consider third party safety.

886 F.2d at 896. It is clear, therefore, that the "essence" of Johnson Controls' "normal operation" as a battery manufacturer includes consideration of the health of its workers and their unborn.

Similarly, as properly found by the court below, Johnson Controls' fetal protection policy is "directly related" to its concern with industrial safety. *Id.* According to the Seventh Circuit:

> Certainly a policy is directly related to industrial safety when it protects unborn children from a substantial risk of devastating permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical.

Id.

Indeed, "[m]ore is at stake," *Dothard*, 433 U.S. at 335, in a fetal protection case than the risk to mother and fetus. Companies face the very real possibility of tort lawsuits where a fetus is born deformed. As explained by dissenting Judge Posner, 886 F.2d at 904:

> The parties agree that there is a solid medical basis for concern with fetal injury from airborne lead in the concentration found in battery plants, and this concern could in turn cause the employer to worry about being sued by injured children of his employees. Such a suit would not be preempted by workers' compensation law, because the plaintiff would not be the worker. *The employer would therefore be exposed to full common law damages, punitive as well as compensatory. The mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. . . .*[14] *It would merely make*

[14] The Seventh Circuit cited the following cases for this proposition: *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 200 n.14, 342 N.W. 2d 37, 53 n.14 (Wis. 1984); *In re Estate of Infant Fontaine*, 128 N.H. 695, 519 A.2d 227, 230 (N.H. 1986); *Fabianke v. Weaver*, 527 So. 2d 1253, 1258 (Ala. 1988).

> *the mother a joint tortfeasor with the employer. Moreover, she might not be negligent; the pregnancy might be involuntary, and lead can injure the fetus before the mother knows she is pregnant.*

(Emphasis added).

From the perspective of the amici EEAC and NAM, these concerns about tort liability are of major concern. Indeed, the magnitude of exposure is potentially astronomical. As also noted by Judge Posner:

> *[I]t is difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example drove the asbestos industry into bankruptcy), to dismiss it as trivial. The possibility of tort suits against battery manufacturers for lead injury to the child of a female employee is not merely a theoretical one. There has already been one reported case; the plaintiff got to a jury, but lost.* See *Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D.Kan. 1985). *We should not dismiss the concern over tort liability as a narrow, selfish "bottom line" concern irrelevant to the purposes of Title VII.* The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers' bloodstreams. That is a social cost that Title VII does not require a company to ignore. *At some point it may become large enough to affect the company's normal method of operation* and supply the ground for a bona fide occupational qualification of infertility.

Id. at 905 (emphasis added).

If fetal protection policies are analyzed under the UAW's version of a BFOQ standard, many companies will have to abandon their programs or go out of business. Clearly, companies will not be able to defend their

protective plans under the UAW's proffered BFOQ standard, because they will not be able to prove that the women excluded cannot perform the physical tasks of their jobs.

Besides risks to the fetus and the employer, there are also risks to society from fetal lead exposure. Specifically, as noted by the Seventh Circuit majority, there would have to be established "government financed programs to train or maintain a handicapped child in non-institutional or institutional environments and to provide the child with the training necessary to overcome the mental and physical harm attributable to lead exposure." 886 F.2d at 897-98. Indeed, from a societal point of view, it makes no sense to shut down completely a company's production of batteries if production will only be moved overseas.

As we show more fully in the next section, an employer's requirement to establish that its policy is "reasonably necessary" to its "normal operation" must not be excessively burdensome, but rather the burden must remain, for the most part, with the plaintiff. Again, the standard must take into consideration the nature of an employer's business, as well as its concern for the safety of its workers and third parties.

IV. THE BURDEN OF PERSUASION REMAINS ON THE PLAINTIFF AT ALL TIMES TO CREATE A RECORD, TO ESTABLISH A PRIMA FACIE CASE, TO REBUT AN EMPLOYER'S SHOWING, AND TO SHOW A REASONABLE ALTERNATIVE.

Under both the disparate treatment and the disparate impact models, the plaintiff maintains the burden of persuasion at all times. *See Wards Cove*, 109 S.Ct. at 2126; *Burdine*, 450 U.S. at 256-258. Although the EEOC and the Government argue that the employer's rebuttal burden should be more rigorous under the BFOQ standard, we submit that this burden is met where the employer makes the showing discussed in Section III. Again, this Court should not construe Title VII as making the em-

ployer's "reasonably necessary" showing overly burdensome to the point where safety is read out of the Act. Rather, it is sufficient that an employer produce evidence of legitimate concerns for the safety of its employees and/or third parties.

Apart from this rebuttal showing, we view it as essential that this Court maintain the requirement that a Title VII plaintiff meet specific burdens. First, as a general matter, a plaintiff must create a record upon which a court can assess the legal and factual issues. 886 F.2d at 888. Here, for example, the Seventh Circuit found that the UAW failed to establish a record regarding the lack of fetal risk.

Second, the plaintiff must establish a *prima facie* case and rebut the employer's articulation of its defense. This comports with the general rules of proving and defending discrimination cases discussed in Section I of this brief.

Third, the plaintiff should have the burden of establishing adequate, but less discriminatory alternatives to the company's fetal protection policy. Here, of course, the UAW neglected to raise the issue of alternatives in its brief to the Seventh Circuit, and thus lost its right pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure. 886 F.2d at 891. But even assuming that the UAW had properly briefed the issue, this Court should endorse the rigorous standard adopted by the Seventh Circuit below, which in turn is drawn from this Court's decision in *Wards Cove*. As explained by the court below:

> . . . *Wards Cove* makes clear (1) that the UAW bears the burden of presenting specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also bears the burden of demonstrating that its proposed alternative policy is "*equally* effective [as Johnson Controls' fetal protection policy] in achieving [Johnson's] legitimate employment goals," *Wards Cove*,

> 109 S. Ct. at 2127 (emphasis added); and (3) that *this inquiry is to be undertaken with the recognition that* "'[f]*actors such as the cost or other burdens of proposed alternative selection devices are relevant* in determining whether they would be equally as effective as the challenged practices in serving the employer's legitimate business goals,'" Id. at 2127 (quoting *Watson v. Fort Worth Bank & Trust*, —— U.S. ——, 108 S.Ct. 2777, 2790 (1988) (O'Connor, J.)) . . . .

886 F.2d at 892 (emphasis added).

Against this background, it should be emphasized that courts are "generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). "[C]onsequently, the judiciary should proceed with care before mandating that an employer must adopt [an alternative employment practice] in response to a Title VII suit." *Wards Cove*, 109 S.Ct. at 2127.

It is the experience of the amici, EEAC and NAM, that employers do not adopt fetal protection policies "incautiously" or with any malice to discriminate against women, and they certainly do not do so for "minor gains" in fetal health. To the contrary, employers are naturally inclined to hesitate before adopting such a policy for a number of reasons. First, of course, is the reason that exclusion of a substantial section of the workforce leads to a smaller pool of qualified applicants and workers—a problem that exists in the present workforce, and that will become acute in the 1990s and beyond as the number of qualified workers decreases. W. Johnston and A. Packer, *Workforce 2000: Work and Workers for the Twenty-First Century*, Hudson Institute (1987); R. E. Ketscher, *Outlook 2000: Projections Summary and Emerging Issues*, Monthly Labor Review (November 1989). In fact, employers that adopt fetal protection policies run the risk of losing *current* employees who would otherwise be transferred to safer jobs within the plant.

Here, of course, there is no evidence that Johnson Controls adopted its policy in order to exclude women simply because they are women, but rather did so out of a legitimate concern for safety.

Additionally, adoption of a fetal protection policy undoubtedly complicates the administration of the workforce since medical authorizations have to be secured and records have to be maintained. In fact, as indicated by the facts of the instant case, employers face the costs and burdens of defending sex discrimination suits—ironically for taking a far-sighted approach to the elimination of a fetal health problem.

Accordingly, where the lives and health of the unborn are at stake, it makes sense for the courts to defer to an employer's reasonable decision and to appreciate the fundamental importance of safety. *See Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

CONCLUSION

For the foregoing reasons, the amici curiae respectfully submit that the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Reproductive and Fetal Hazards Under Title VII (reprinted in Empl. Prac. Manual (BNA)) 12

No. 89-1215

In The

Supreme Court of the United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT, JOHNSON CONTROLS, INC.

INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation and New England Legal Foundation respectfully submit this brief amicus curiae in support of respondent. Consent to the filing of this brief has been granted by counsel for all parties.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

The New England Legal Foundation is a nonprofit public interest law firm incorporated in Massachusetts and dedicated to furthering the goals of free enterprise, protection of personal and property rights, and maintenance of limited, balanced, and rational government regulation of private conduct. The Foundation's litigation strategy is set by its Legal Review Committee which is composed of attorneys employed by major New England corporations and private law firms. The Committee reviews proposed litigation to determine whether it is consistent with the Foundation's goals and in the public interest. That Committee has approved the filing of this amicus brief.

Amici believe that their public policy perspective will assist the Court in its review of this case. Specifically, amici will argue that Title VII does not prohibit legitimate, scientifically based programs to promote reproductive health.

INTRODUCTION

By all accounts, this is an odd case. At issue is an employer's program to promote human health and safety. This employer began protecting its employees before the federal government imposed this protection through the Occupational Safety and Health Act. This employer continues to provide its employees with a safer workplace than the law commands.

The policy at issue in this case is based on valid scientific evidence. This policy is designed to protect the children of the employer's female employees. There is no dispute in this case that the danger to these children is real. A significant body of scientific evidence counsels that the danger, in this case, is caused by exposure of the mother and not the father.

This policy protects against lead poisoning—an environmental risk long recognized as the cause of irreparable learning disabilities and retardation. There is no dispute about this, just as there is no dispute that lead poisoning could cause permanent brain damage to the impacted child. All this notwithstanding, the issue before this Court is whether the employer is required to put aside concerns about its employees' children's health. Indeed, the issue is whether the employer who fails to put these concerns aside has violated federal law. In the absence of clear congressional intent to the contrary, amici urge the rejection of legal theories that would put children at such risk.

SUMMARY OF ARGUMENT

This Court should proceed from the premise that Congress, in enacting Title VII, did not intend to prohibit employers from acting to protect the health of their employees' children. None of the existing modes of analysis, however, take this interest in protecting reproductive health into account. Disparate impact analysis is inappropriate in this case because the policy at issue is not "facially neutral." Given the biological dichotomy between the roles of the sexes in reproduction, policies relating to reproductive health will almost always be directed at either male or female employees exclusively.

In enacting Title VII, Congress recognized this biological dichotomy. This recognition is embodied in the bona fide occupational qualification (BFOQ) exception to the prohibition on gender discrimination. In light of this Court's admonition that the BFOQ exception is extremely narrow, that exception may not be suited for this type of case. Although, there is no question that women can physically perform the jobs in question that performance would be at a socially unacceptable cost.

Amici believe the best way to analyze this case is to recognize, as the Equal Employment Opportunity Commission (EEOC) has, that the reproductive health cases are a class unto themselves. The Court should allow the employer, as an affirmative defense to a prima facie case of sex discrimination, to prove a business justification for the reproductive health policy. The employer's burden would be to establish a sound scientific basis for the policy. The claimant could rebut the employer's case, however, by demonstrating the existence of a reasonable,

less discriminatory alternative that would achieve the same goal of protecting reproductive health.

ARGUMENT

AN EMPLOYER MAY ACT TO PRESERVE HUMAN SAFETY WITHOUT VIOLATING TITLE VII OF THE CIVIL RIGHTS ACT

This case fits neatly into none of the traditional modes of analyzing Title VII claims. This lack of a fit is apparent from the diversity of opinion among the Courts of Appeals. The court below felt that both the disparate impact and the bona fide occupational qualification analysis were appropriate, notwithstanding their apparent mutual exclusivity. The Eleventh Circuit, in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1547-48 (11th Cir. 1984), considered arguments that such cases be treated as disparate treatment actions and analyzed under the burden shifting formula of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

While either of these modes of analysis can, perhaps, be "made to fit," amici urge the Court to follow the lead of the EEOC and to treat these cases involving fetal protection policies as a class unto themselves. Under the EEOC approach, the employer's policy is subjected to a test similar to the business justification analysis applied in disparate impact cases. This analysis provides the best protection against illicit discrimination while at the same time it provides employers the freedom to protect human safety. This would also allow time for Congress to decide

how it wishes to approach this subject without subjecting the employees' children to a demonstrable health risk in the interim.

I

TRADITIONAL TITLE VII ANALYSIS IS INAPPROPRIATE IN CASES CONCERNING PREVENTION OF REPRODUCTIVE HARM

As noted above, the Courts of Appeals have found ways to make cases such as this "fit" into one or more of the traditional modes of analysis. Each court has noted the analytic difficulties presented by these cases. This conclusion that there are analytical difficulties in these cases, however, rests upon the assumption that it is rational for an employer to act upon scientific evidence of potential reproductive harm and the further assumption that Congress did not intend to prohibit such action.[1] Thus, the lack of a "fit" in the traditional analyses is their apparent inability to take into account the employer's interest in preventing reproductive harm.

A. Disparate Treatment—Pretext Cases

There are two modes of analyzing discrimination claims that are based on a charge of disparate treatment

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[1] Throughout this argument, amici presume that the court below correctly found the existence of scientific evidence to back the employer's claims that the reproductive harm at issue derives exclusively from the mother and that the harm can take place before the woman knows that she is pregnant. *See* Joint Appendix at 5-9, 15-16, 148-50, 167, 198-99, 240. These scientific issues would, of course, need to be established by the employer in defending against sex discrimination claims.

or intentional discrimination. The first challenges discriminatory conduct that is masked by pretextual explanations. The second involves admitted discrimination that is claimed to be a bona fide occupational qualification.

In pretext cases, this Court has recognized that there will be problems of proof in establishing that an employer has engaged in intentional discrimination. Thus, in *McDonnell Douglas* this Court established a procedure whereby the claimant could establish a prima facie case by showing that the adverse employment decision was based, more likely than not, on illicit discrimination. Once that was established, the employer was required to come forward with legitimate, nondiscriminatory reasons for the decisions. The claimant then had the opportunity to show that the reasons given were merely a pretext for unlawful discrimination. *McDonnell Douglas v. Green*, 411 U.S. at 802-03; *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 575-78 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-56.

At first blush, this burden shifting formula appears to be well-suited for cases such as this. During the course of trial, the employer would be permitted to produce the scientific evidence claimed to support the policy, and the employee would be permitted an opportunity to rebut that evidence. The problem lies, however, in the first step of the analysis. This line of analysis was developed for those cases where the discrimination was intentional, but hidden. The discrimination in this case is not hidden, however. The employer's policy is very explicit: fertile women will not be hired for positions where the level of

airborne lead poses significant reproductive harm. Further, the employer would not be able to rebut the argument that the claimant was not hired because of her gender. Instead, the employer could only show that there was a "good reason" for disqualifying the claimant on the basis of sex—a defense apparently not allowed under *McDonnell Douglas*. Thus, the "pretext" analysis does not assist in deciding claims that the employer is acting to protect against reproductive harm. *Hayes*, 726 F.2d at 1547-48; *see also City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978).

B. Bona Fide Occupational Qualification

The second type of disparate treatment case involves employer conduct that admittedly treats employees differently on the basis of gender. The employer argues that such discrimination is lawful, however, as a "bona fide occupational qualification."

This Court has ruled that the bona fide occupational qualification exception to Title VII's prohibition of gender discrimination is "extremely narrow." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). In *Dothard*, this Court cited, with apparent approval, lower court decisions to the effect that the bona fide occupational qualification defense applies only " 'when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.' " *Id.* at 333 (quoting *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (emphasis in original)).

Dothard rejects the notion that employers could bar women from employment for their own safety. Instead,

this Court ruled "that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335. Nor can the employer rely on preconceived notions of a woman's relative abilities. Instead, the employer must show "[t]he employee's very womanhood would . . . directly undermine her capacity" to perform the job in question. *Id.* at 336.

The court below adopted the bona fide occupational qualification defense as a secondary basis for upholding the employer's policy of preventing reproductive harm. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 893 (7th Cir. 1989). That court ruled that industrial safety "is legitimately part of the 'essence' of the 'business' of a battery manufacturing enterprise." *Id.* at 896. While this does accomplish the purpose of moving the case to the stage where the employer would be put to its scientific proof, it does not appear to address this Court's concern that the bona fide occupational qualification exception is extremely narrow. *Dothard*, 433 U.S. at 334. The analysis employed below goes beyond the central question in traditional BFOQ cases, namely whether the disqualified class is, in fact, unable to perform the job merely on the basis of their membership in the class. Here, fertile women could perform the job, but at a socially unacceptable cost. The court below proposes to take this cost into account in the context of a BFOQ analysis. Amici believe that the analysis originally proposed by the EEOC addresses all of these concerns. *See* Part II, *infra*.

C. Disparate Impact/Business Justification

The primary basis for the holding in the court below was the business justification defense. This defense has

traditionally been applied in cases where the claim is one of disparate impact, rather than disparate treatment. In such cases, the claimant need not establish intentional discrimination. Instead, the claimant points to a particular employment practice that, while facially neutral, disproportionately impacts a particular class. The employer may survive the claim by establishing that the challenged practice is supported by a "business justification." Even then, the claimant will prevail if she can demonstrate the availability of alternate means to achieve that business purpose with a less discriminatory impact. *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L. Ed. 2d 733, 751-52 (1989).

To establish a business justification the employer must demonstrate that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 752. The practice need not be essential to the business, but at the same time it must be more than a mere insubstantial justification. *Id.* at 752-53.

This is essentially the analysis adopted by the court below, the Fourth Circuit in *Wright v. Olin Corporation*, 697 F.2d 1172 (4th Cir. 1982), and the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*. The decisions of the Fourth and Eleventh Circuits are notable for their verbal gymnastics in attempting to characterize cases such as this as involving "facially neutral" policies. *Wright*, 697 F.2d at 1186; *Hayes*, 726 F.2d at 1552.[2] In *Wright*, the

[2] The court below apparently dispensed with this element of the analysis altogether, as does the EEOC.

court noted that the issue of facial neutrality was subject to logical dispute, but brushed that dispute aside as "mere semantic quibbling." *Wright*, 697 F.2d at 1186. The *Hayes* court fared no better in its attempt to explain neutrality:

> "If an employer proves that a policy applying only to women or pregnant women employees is justified on a scientific basis and is not necessary to protect the offspring of male employees, the employer has shown that its policy is neutral, in the sense that it equally protects the offspring of all employees." *Hayes*, 726 F.2d at 1552.

But in both cases, and this case as well, the policies at issue were not "facially neutral" as that term is understood in usage. Indeed, given the biological dichotomy between the roles of the sexes in reproduction, policies relating to reproductive health will almost always be directed either at male or female employees exclusively. Of course, if the policy in fact applied to fertile employees of either sex, no claim of discrimination would exist since the employees of either gender would be treated equally.

II

THIS COURT SHOULD ADOPT THE EEOC BUSINESS JUSTIFICATION APPROACH

Although the business justification analysis was not originally designed for cases involving "overt" discrimination, it provides the best framework for testing the claims of the employer. As demonstrated below, the business justification analysis promotes the dual goals of

preventing illicit discrimination and allowing employers to implement scientifically justified policies protective of reproductive health.

If the Court adopts the view that Congress did not intend to prohibit employers from protecting children from workplace hazards, as amici believe the Court should, then both of the above modes of analysis fall short of reaching this goal. This is why the EEOC has recognized that reproductive health cases are "a class unto themselves." Policy Statement on Reproductive and Fetal Hazards Under Title VII n.11 (reprinted in Fair Empl. Prac. Manual (BNA) 405:6613, 6615).[3] Amici believe that the EEOC, and the court below, have developed the appropriate analytical framework for such cases and we urge the Court to adopt that framework.

Under the EEOC framework, once a claimant makes out a prima facie case of sex discrimination, the employer must demonstrate that the policy is based on the potential for substantial risk, documented by scientific evidence, where the risk is not shared by both sexes. Even then, the claimant may rebut that case with evidence that a reasonable, less discriminatory alternative exists. *Id.* at 6617-18.

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[3] The EEOC has since relabeled its analysis as one involving the bona fide occupational qualification defense. The purpose of the new label is to ensure that the employer retains the burden of proof. EEOC, Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.*, ___ F.2d ___, 51 EPD ¶ 39,359 (7th Cir. 1989) (Jan. 24, 1990). Amici address this problem at Pages 13-15, *infra*, without resorting to a simple "relabeling" of the analysis.

Amici believe that this framework serves the dual role of protecting reproductive health and preventing illicit discrimination. Employers are free to adopt reproductive health programs only when they can demonstrate a scientific basis to do so. Employers who adopt such programs as a pretext for discrimination or on the basis of "romantic paternalism" will not survive the scrutiny called for by the EEOC. Not only must the employer demonstrate with scientific evidence that a significant risk of harm exists, the employer must also show that risk is not shared by both sexes.

Finally, the claimant could still argue for alternative practices that do not carry the same discriminatory impact. Such practices could include feasible means for removing the contaminant from the workplace or otherwise effectively protecting all workers from exposure. If the policy impacts only on women, it may be that the danger does not exist for the first several months of pregnancy, thus, allowing women to perform the jobs in question and take a leave of absence, or temporarily transfer to another job on discovery of the pregnancy.

The final issue that remains involves allocation of the burden of proof. The court below, viewing this as a case involving the business necessity defense to a disparate impact claim, applied this Court's recent ruling in *Wards Cove*. In that decision, this Court held that the burden of persuasion remains at all times with the plaintiffs, and the only burden shifted to the employer is to produce evidence of a business justification. *Wards Cove*, 104 L. Ed. 2d at 753. In the decisions prior to *Wards Cove*, the

Eleventh and Fourth Circuits placed the burden of persuasion on the employer to establish the scientific validity of the reproductive health policy. *Hayes*, 726 F.2d at 1552; *Wright*, 697 F.2d at 1190. The EEOC does not address this question in its policy statement.

In this instance, we think that the Court should recognize reproductive safety policies as an *affirmative defense* to a charge of discrimination. This would require the employer to carry the burden of persuasion on the scientific validity of the policy, but would leave the claimant the burden of establishing all other elements of the case, such as the existence of less discriminatory alternatives. We believe that this departure from the formulation in *Wards Cove* is justified by the differences in the types of cases.

In *Wards Cove* the employer is being charged with discrimination simply on the basis of statistics. Faced with this charge of inferential discrimination, the employer can be required to rebut the charge by establishing a business justification for the challenged practice. If the employer was required to bear the burden of proving the negative proposition of nondiscrimination, however, it would lead to a nearly impossible situation in which employers would be forced to choose between unjustified Title VII liability and the imposition of strict quotas. *See Wards Cove*, 104 L. Ed. 2d at 749.

These same policies are not present in this case. This is not a case of inferential discrimination or disparate impact. The employer is not required to prove a negative. Instead, the employer has chosen to treat job applicants differently based on scientific evidence of the potential

for reproductive harm. Since the employer must develop a substantial body of evidence to justify such a practice under the EEOC policy, requiring the employer to carry the burden of persuasion on this one element would not be unfair.

CONCLUSION

Amici urge this Court to allow employers to choose to protect against reproductive injury. The policies of Title VII will still be vindicated by requiring the employer to come forward with evidence that the policy is scientifically based, and the substantial risk to reproductive health is carried only by one sex. Title VII should not be interpreted to bar policies that protect the health of children.

DATED: July, 1990.

Respectfully submitted,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

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Respondent.

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. WLF engages in litigation and the administrative process in a variety of areas promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

To this end WLF has filed briefs *amicus curiae* in a number of the leading Supreme Court cases involving issues of civil rights. *See, e.g., Metro Broadcasting, Inc.*

v. Federal Communications Commission, 58 U.S.L.W. 5053 (June 27, 1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. Weber*, 443 U.S. 193 (1979).

WLF has also appeared *amicus curiae* before this Court in a number of cases affecting the free enterprise system. *See, e.g., Pacific Mutual Life Insurance Company v. Haslip, cert. granted*, 58 U.S.L.W. 3628 (April 2, 1990); *Kansas and Missouri v. Utilicorp United Inc.*, 58 U.S.L.W. 4898 (June 21, 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 481 U.S. 412 (1987); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). WLF has also appeared *amicus curiae* in *Oil, Chemical & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) -- a case that dealt with OSHA and fetal protection policies.

Amicus is concerned with the rights of employees, employers, and the general public. *Amicus* is also concerned that unless employers are allowed to adopt reasonable safety standards, they will risk liability exposure that could bankrupt them. *Amicus* believes that Title VII of the 1964 Civil Rights Act, as amended, does not require employers to choose between violating Title VII or assuming the risk of going out of business because of the enormous liability created by fetal lead exposure. Rather, the risk of catastrophic tort liability is a proper defense to a charge of sex discrimination when the allegedly discriminatory policy is implemented to protect employees and their potential offspring from the risk of serious health problems resulting from occupational hazards.

Amicus submits this brief in support of the Respondent with the written consent of both parties. The parties' written consents are on file with the Clerk of the Court.

Amicus believes that the decision of the U.S. Court of Appeals was correct. *Amicus* will present arguments supporting tort liability as a BFOQ defense to a charge of sex discrimination; those arguments will not be presented by the other parties.

STATEMENT OF THE CASE

Amicus is, in the interest of brevity, omitting any statement of the facts of this case. *Amicus* adopts by reference the statement of facts contained in Respondent's brief.

SUMMARY OF ARGUMENT

Johnson Controls' fetal protection policy, while adopted for health and safety reasons, also shields the company from the risk of toxic tort liability resulting from fetal lead exposure. In the absence of that policy, the offspring of Johnson Controls' female employees might suffer serious injuries from lead exposure in the workplace. Those offspring, if injured, could have a cause of action against the employer. That tort liability could have a catastrophic effect on Johnson Controls' ability to do business.

Petitioners and the *amici* supporting Petitioners have suggested numerous defenses that Johnson Controls might use to defend against any such potential tort liability. However, those defenses may not insulate Johnson Controls from liability. When the risk of tort liability has the very real potential of putting an

employer, such as Johnson Controls, out of business, that risk is a proper defense to a charge of sex discrimination.

The potential tort liability faced by Johnson Controls reflects the value that society places upon the health and safety of both workers and their offspring. Permitting an employer to take into consideration the potential costs of tort liability serves the public interest in that it provides a means to measure the sometimes competing values of a healthy and safe workplace with that of a workplace free of any gender distinctions.

ARGUMENT

I. INTRODUCTION

Johnson Controls instituted its fetal protection policy as part of a comprehensive program to protect its employees and their families from the adverse effects of exposure to lead in the workplace. Johnson Controls did not adopt the policy to protect itself from potential tort liability. However, as Judge Posner asserted in his dissent in the case below, the potential costs of tort liability may supply the ground for a bona fide occupational qualification defense. *Amicus* respectfully suggests that the Court take this opportunity to state that evidence of social and economic costs arising out of potential tort liability can serve as the basis for a bona fide occupational qualification (BFOQ) defense.[1]

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[1]In the event this Court were to classify this case as a disparate impact rather than as a disparate treatment case, Johnson Controls would have available to it the defense that the policy serves in a legitimate way the employment goals of the employer. *See, Wards Cove Packing Co. v. Aton* 109 S.Ct. 2115 (1989). The arguments presented below regarding a bona fide occupational qualifi-
(continued...)

II. JOHNSON CONTROLS COULD BE EXPOSED TO TORT LIABILITY FOR EXPOSING FETUSES TO HAZARDOUS CHEMICALS

A. The Business Of Johnson Controls Requires That Some Employees Will Be Exposed To Lead

Johnson Controls' fetal protection policy protects it from a very real threat of tort liability that could put Johnson Controls out of business. Johnson Controls produces lead-based batteries. The "business purpose" of the Battery Division of Johnson Controls is the production of those batteries. As the district court found in this case, the use of lead is necessary to the production of batteries. *International Union v. Johnson Controls*, 680 F. Supp. 309, 317 (E.D. Wis. 1988).

Petitioners concede that, based upon the current state of technology, the production of batteries will necessarily expose some employees involved in that production to lead. (Pet. br. 5). *Amici* supporting Petitioners, NAACP Legal Defense and Educational Fund, Inc. and the National Black Women's Health Project, wax eloquent in their brief on the dangers to employees and their offspring posed by exposure to toxic chemicals. There is no question that exposure to certain levels of lead can cause damage to fetuses. That danger is not disputed by the Petitioners. (Pet. br. 4).

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[1](...continued)
cation (BFOQ) defense would also support a contention that Johnson Controls has gone forward with sufficient evidence to establish a *Wards Cove* defense. However, WLF, will restrict this brief to a discussion of why the potential for tort liability is a BFOQ defense.

It is also undisputed that in an attempt to protect employees and their offspring, Johnson Controls fully complied with the Occupational Safety and Health Administration's (OSHA) maximum lead exposure level standard. Johnson also took additional steps to minimize the risk of employee and fetal exposure to lead, including warning female employees of the potential dangers posed by exposure to lead in the workplace.

Despite taking protective steps, Johnson Controls concluded that the lead levels its employees were exposed to created a genuine risk of injuries to children born of female employees.

The district court below found that while there was disagreement amongst the experts, Johnson Controls carried its burden of showing that the fetal protection policy was necessary to avoid the significant and unreasonable risk of lead exposure to fetuses of employees. *Johnson Controls, Inc.*, 680 F. Supp. at 315. Consensus in the scientific community is not required to show that a considerable risk exists. *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). Furthermore, if a toxic tort suit were to be filed against an employer, few state courts would be likely to accept evidence of a dispute regarding such dangers within the scientific community as a complete defense, particularly where the employer's own experts concluded that there was an unreasonable risk of fetal damage.

B. Fetal Exposure To Lead Subjects Johnson Controls To A Risk Of Catastrophic Tort Liability

The risk posed to fetuses made it necessary for Johnson Controls to take additional steps to eliminate

fetal exposure. As Judge Posner pointed out in his dissent below, Johnson Controls faced a very real risk of tort liability to children who suffered injuries resulting from their *in utero* exposure while their mothers worked at the plant.[2] This Court should be cognizant of such risks in formulating the proper contours of a BFOQ defense.

The risk faced by Johnson Controls to tort liability from employees' children was significant. Every jurisdiction permits lawsuits by children injured as a result of injuries sustained *in utero*. *Prosser and Keeton on the Law of Torts* § 55, at pp. 368-69 (5th ed. 1984). There are a number of cases in which children have claimed damages because of *in utero* exposure to toxic substances. *See, e.g. Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied sub. nom. R. Squibb & Sons v. Sindell*, 449 U.S. 912; *Enright by Enright v. Eli Lilly & Co.*, 553 N.Y.S.2d 494 (A.D.3 Dept. 1990).

The Trial Lawyers for Public Justice as *amicus* in support of Petitioners have suggested that a child would have a difficult time prevailing on a toxic tort claim against Johnson Controls due to problems of proof and causation. However, in light of Johnson Controls' admission that the levels of lead exposure are a risk to

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[2]While Judge Posner was correct in his analysis that the potential for tort liability can be a BFOQ defense, *amicus* disagrees with his conclusion that summary judgement was not appropriate.

fetal health, a potential plaintiff's problems with causation and proof may not be quite so difficult.[3]

C. Any "Risks" to Male Reproductive Systems Are Irrelevant to the Case at Bar

Amici Trial Lawyers for Public Justice and the states of Massachusetts *et al.*, in their briefs in support of Petitioners, attempt to shift the debate from the risks posed to children of fertile females exposed to lead to the alleged risks posed to children conceived by males who have been exposed to lead. The attempt to shift the debate is misguided.

If the record in this case showed scientific evidence of a real risk to the offspring of male employees and the employer chose to ignore that evidence, then that might very well be evidence that Johnson Controls was using its fetal protection plan as a pretext to engage in invidious sex discrimination. However, that is not the record. Petitioners and *amici* in support of Petitioners might like to re-litigate the case; however, they had the opportunity to establish a record regarding the offspring of male employees in the district court and failed in

[3]Of course, Johnson Controls could have adopted the OSHA standards and not done any further research into fetal dangers, thereby denying crucial evidence to potential plaintiffs and protecting itself. Fortunately, Johnson Controls acted responsibly. Such responsible corporate policy should as a matter of public policy be encouraged. If petitioners are successful, employers may have a disincentive to conduct further research and communicate frankly with their employees about the risks of fetal injuries.

their attempt to do so. It is too late for Petitioners and their *amici* to rewrite the record now.[4]

In summary, in the absence of a fetal protection policy Johnson Controls would be a prime candidate for a tort suit from a child born to an female employee who was exposed to lead.

III. JOHNSON CONTROLS CANNOT RELY ON THE DEFENSES TO TORT LIABILITY SUGGESTED BY PETITIONERS

Johnson Controls took every reasonable step possible -- short of shutting down operation of the Battery Division -- to remedy the problem of fetal lead exposure. The company was fully in compliance with the lead exposure limits set by OSHA, and it has warned employees of the dangers involved.

While Petitioners admit that "children may sue for torts committed before birth," they go on to argue unconvincingly that there is no legal theory that would permit employees' children to recover against Johnson Controls. Petitioners claim that Johnson Controls could "fulfill its duty of care by meeting OSHA standards, taking all actions that a reasonable company would take to further reduce exposure to the risk which an employer reasonably should be aware (such as providing respirators), and taking reasonable care to warn workers

[4]The risks faced by male and female workers and their offspring will not always be evenly distributed between the sexes. Petitioners and *amici* supporting Petitioners may wish that nature conformed to their ideological wishes, but industrial safety policy must be based upon scientific evidence and not upon what the parties wish the scientific evidence was.

about those significant risks of which an employer should be aware." (Pet. br. 35 n.31).

A. Warnings Are Not Likely To Protect A Company In A Fetal Toxic Tort Suit

What liability would Johnson Controls be subjected to if it took all technologically feasible steps to eliminate and minimize the dangers of fetal lead exposure and warned employees of those dangers but stood by and allowed fertile female employees to face the dangers? Contrary to what Petitioners argue, it is clear that Johnson Controls would be, as Judge Posner pointed out, "exposed to full common law damages, punitive as well as compensatory." *International Union, UAW v. Johnson Controls*, 886 F.2d 871, 904 (7th Cir. 1989) (en banc) (Posner, J., dissenting).

First, Petitioners suggest that warning employees will serve as a defense in a tort liability suit. *Amicus* agrees that warning employees of the dangers of lead exposure coupled with taking all reasonable steps to minimize lead exposure *should* relieve Johnson Controls of any tort liability for injuries suffered by the employees themselves. In the situation where the worker and the person at risk are one and the same person, it makes sense to let the worker make an informed decision as to whether to assume that risk. Such a warning may also limit the tort liability owed to a parent for the damages done to the employee's child.

A further difficulty with relying on warnings is the fact that there are two parents. What if the father of the child objected to the fetuses' exposure but the mother chose to continue working? It would be impossible for the employer to warn all of the sexual partners of all the fertile female employees -- any of those

partners could father a child later exposed *in utero* to dangerous levels of lead. While a court might also find the mother to be also liable in a toxic tort suit, the unwarned father may very well have a cause of action against the mother's employer.

Furthermore, warnings are often not sufficient to deter individuals from engaging in dangerous conduct. Warnings to pregnant women about the risks of cigarettes, alcohol, and illegal drugs have not stopped pregnant women from using those products. The evidence is clear that despite warnings some pregnant women continue to smoke and drink even though they are aware of the potential for injuries to their children resulting from such conduct. Johnson Controls' own experience with warnings indicated that they were not successful in deterring fertile employees from working in areas of potentially dangerous lead exposure.[5] If an employer knows that an employee is unlikely to heed his warning, then that warning is unlikely to be viewed as a valid defense to any suit brought by the employee's children.

A more significant problem is that employers owe a legal duty of care not only to their employees but also to the employees' fetuses. *Prosser and Keeton on the Law of Torts* § 55, at pp. 367-370 (5th ed. 1984). While an employer might be able to warn the parents of potential dangers, it is not in a position to warn the fetus of those dangers, and the fetus can not make a

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[5] An employee might even argue that if the warnings are sufficiently strong to be successful in deterring fertile women from working in areas where lead exposure could be dangerous to a fetus, then a warning might be a violation of Title VII, since the "scare" tactic had a disparate impact upon women in the workplace.

decision to act upon any warnings. Nor can a parent waive tort liability on behalf of an unborn child.

B. Compliance With OSHA Standards May Not Protect An Employer From Toxic Tort Liability

Petitioners also argue that compliance with Occupational Safety and Health Administration (OSHA) standards would be a defense in a toxic tort suit. Johnson Controls already complies with those standards. However, compliance with OSHA airborne lead exposure standards is no guaranteed shield against tort liability for damage done to a fetus. Some states have criminally prosecuted employers for workplace safety violations even when the employer is in compliance with OSHA standards. See, *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E.2d 962 (1989), *cert. denied sub. nom. Asta v. State of Illinois*, 110 S.Ct. 52 (1989); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State v. Black*, 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. App. 1988).

Courts in those states, including Wisconsin (where this case arose), found that the federal Occupational Safety and Health Act (the "OSH Act") does not preempt state criminal prosecutions against employers in compliance with OSHA regulations; those cases suggest that tort actions against those in compliance with OSHA regulations are similarly unpreempted. Indeed, § 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), is a "savings clause" that states explicitly that the OSH Act does *not* preempt state tort law. While an employer could point to his compliance with OSHA regulations as *evidence* that he acted reasonably, he nevertheless faces the risk that a jury could conclude otherwise. It is difficult to believe that Congress, when it adopted Title VII and the

OSH Act, intended to require employers to face that risk.

Moreover, an employer could not claim as a defense either OSHA preemption or compliance with OSHA standards in those areas where OSHA has not promulgated a specific safety or health standard.[6] The OSH Act explicitly leaves to the states jurisdiction over "any occupational safety or health issue with respect to which no federal standard is in effect. . . ." 29 U.S.C. § 777(a).

C. Title VII May Not Preempt A Toxic Tort Liability Suit

Petitioners' final claim is that the preemption provisions of Title VII would protect the employer from liability in a fetal toxic tort suit. 42 U.S.C. § 2000e-7,

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[6]In addition to regulating lead levels, OSHA has specific standards for only two other toxic substances that are related to fetal risks. 29 C.F.R. § 1910.1044 (1989) (dibromochloropropane); and 29 C.F.R. § 1910.1047 (1989) (ethylene oxide). There are no specific standards for other toxic substances that might have an effect on fetuses. Employers that use toxic substances in their work places other that the above two and lead would not have OSHA standards to rely upon. Furthermore, the OSH Act contains a general duty clause which requires employers to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 645(a)(1). A known toxic hazard that might cause the death or serious injury to the fetus of an employee might be covered by that clause. In such cases not only the states but OSHA itself might prosecute.

§ 2000h-4.[7] *Amicus* agrees that fairness dictates that an employer who takes action required by Title VII should be immune from any state-law tort liability arising from the required action. However, employers should not be forced to rely on the hope that Petitioners' interpretation of the Title VII preemption provisions will be adopted in future court decisions.

This Court will find Congressional intent to preempt state law in three circumstances: first, if Congress explicitly states such an intention; second, if Congress has regulated an area to such an extent that its intention to occupy the entire regulatory field is manifest; and third, where the state law at issue is actually in conflict with federal law. *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990).

Title VII does not explicitly preempt state tort law causes of action based on work-related fetal damage. Nor is federal regulation in that area so extensive that one can infer that Congress intended to occupy the field. Indeed, tort law is an area that has traditionally been subject to extensive state regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court

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[7]42 U.S.C. § 2000e-7 provides: Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful pr..ctice under this title.

42 U.S.C. § 2000h-4 provides: Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

has established a presumption *against* implicit federal preemption in areas of the law traditionally subject to regulation by the states. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The only basis for a preemption claim would be a conflict between Title VII and state tort law in the area of fetal protection. There is no certainty that a court would find preemption on this basis in the future. A state court in a toxic tort suit might rule that there were steps that the employer should have taken -- other than excluding women -- to protect children. That might be true even though Johnson Controls is not aware of any equally effective alternatives to its fetal protection policy and even though the Petitioners have not demonstrated any such alternatives.

Given the potential for catastrophic liability exposure, an employer should not be required to guess what a court years from now will say the employer should have done. *Maybe* Title VII preemption protects the employer from a claim that it should have excluded women, but it cannot possibly protect employers from claims that they should have taken other steps -- steps not currently knowable -- short of exclusion. One would hope that the state courts would be reasonable and would not find in retrospect that an employer should have implemented safety measures not currently recommended by a consensus within the scientific community. But an employer should not be forced to rely on the reasonableness of state courts in these matters, especially given the pro-liability record of the state courts in tort actions in recent years. Accordingly, it is difficult to believe that Congress, in adopting Title VII, did not intend to permit employers to take reasonable fetal protection measures -- such as those adopted

by Johnson Controls -- in order to guard against future tort liability.

If Petitioners prevail in this action there will be only one way an employer could be certain of complying both with both Title VII and his legal duty to the unborn children. That is by going out of business. That way, there is no discrimination, and no injuries to children. However, such a solution is no real solution at all because everyone loses -- the employer, all the employees, and the consuming public.

In conclusion, the defenses suggested by Petitioners are unlikely to save Johnson Controls from future liability. Unless Johnson Controls and other, similarly-situated employers can be assured that they cannot be held liable for operations that expose fetuses to potentially hazardous conditions, those employers should not be forced to expose themselves to such potential liability.

IV. TORT LIABILITY CAN BE A DEFENSE TO A TITLE VII CHARGE

If an employer's business requires that some employees be exposed to toxic agents, such as airborne lead, and creates the very real danger of tort liability if fertile women are among those exposed, can such a workplace reality be a defense to a charge of sex discrimination under Title VII?

The Bona Fide Occupational Qualification (BFOQ)[8]

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[8]Section 703(e) of Title VII provides "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those (continued...)

is a statutory defense to a charge of discrimination under Title VII. The Court of Appeals found that Johnson Controls could qualify for a BFOQ defense (as well as a "business necessity" defense), but it did so on other grounds, unrelated to the potentially devastating tort liability that could result in the absence of the challenged fetal protection policy. Nevertheless, the potential for such liability provides an alternative basis for upholding the Court of Appeal's finding of a valid BFOQ defense.

In order to establish a BFOQ defense in a sex discrimination case, an employer must show that the essence of the business operation would be undermined by not engaging in the discriminatory policy. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977). In this case, the essence of the business of Johnson Controls' Battery Division is the production of lead-based batteries. That business would be undermined, if not completely put out of business, by the risk to the employer of tort liability if it allowed fertile women to be exposed to levels of lead that could harm a fetus.

Petitioners and *amici* in support of Petitioners dismiss the contention that tort liability can be the basis of a Title VII defense. They cite *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), for the proposition that costs do not constitute a defense. *Manhart* held that employers could not discriminate against female employees on the basis of the cost of benefit plans. Petitioners rely on that case for the argument that costs can never be a factor in a

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[8](...continued)
certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

defense in a Title VII action. However, *Manhart* is inapposite; it did not even involve a BFOQ defense.

Judge Easterbrook in his dissent also argued that *Manhart* was the final word on the issue of costs and Title VII. *Johnson*, 886 F.2d at 914 ("No firm could exclude women from its workforce by saying that higher costs of pensions and health care made them too costly"). While Judge Easterbrook's statement is obviously correct, the types of costs involved in *Manhart* are qualitatively different from the types of costs involved in this case.

The costs in *Manhart* involved normal expenses of a business. In contrast, the potential tort liabilities facing Johnson Controls are not normal costs of business. While every business takes into account pay and benefits as costs of doing business, no responsible business considers the costs of *avoidable* lawsuits arising from employee exposure to hazards as a normal cost of doing business.

In a situation involving cost differential in the payments of benefits, an employer could eliminate those cost differentials by eliminating pensions and health costs for all employees. Substitution of direct cash payments for benefits might permit an employer to be competitive in attracting employees and might even give an employer an economic advantage over competitors. However, short of closing its business there would be no practical way for Johnson Controls to cure the problem with which it is confronted.

Judge Easterbrook, in his dissenting opinion, states that Johnson Controls' fetal protection policy "only means that female employees' average cost to Johnson exceeds that of male employees." *Johnson*, 886 F.2d at

914. That, however, overlooks the very real possibility that the average cost of fertile female employees could be catastrophic. As Judge Posner stated, it is "difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example have driven the asbestos industry into bankruptcy), to dismiss it as trivial." *Id.* at 905.

Fetal exposure to dangerous levels of lead may subject Johnson Controls to punitive as well as compensatory damages. The explosion of punitive damage awards and their potential economic impact is a topic that has been widely noted. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S.Cal. L.Rev. 1, 33-63 (1982); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 St. Mary's L.J. 351, 380-81 (1983); Owen, *Civil Punishment and the Public Good*, 56 S.Cal.L.Rev. 103, 119-121 (1982).

Juries have awarded punitive damages that could bankrupt some employers. *Seee, e.g., Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654-58 (5th Cir. 1981) *cert. denied*, 459 U.S. 880 (1982) ($5,000,000 verdict upheld); *Airco, Inc. v. Simmons First Nat'l Bank*, 638 S.W.2d 660, 663 (Ark. 1982) (upholding award of $3,000,000 in vindictive damages); *Grinshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $125,000,000 jury verdict to $3,500,000); *Toyota Motor Co., Ltd. v. Moll*, 438 So.2d 192 (Fla. App. 1983) ($3,000,000 in punitive damages); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (affirming punitive damages in amount of $1,000,000).

Toxic tort litigation already has driven into bankruptcy any number of companies that were associated with the manufacture of asbestos -- much of which was manufactured at the request of the federal government. *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 806-845 (1983).

The additional risk of punitive damages awards could drive a company out of business. A successful suit that would put Johnson Controls out of business and put the plaintiffs out of work, would, as Judge Posner pointed out, be a Pyrrhic victory where "the plaintiffs would be in the same position as if the occupational qualification defense had prevailed." 886 F.2d at 907. In both cases the plaintiffs would be out of work. In fact, Judge Posner was too generous to plaintiffs in his evaluation of the possible outcome in this case. Fertile women who choose not to be sterilized could, under Johnson Controls' fetal protection policies, seek other employment opportunities in the company where there would not be a danger to fetal health. If plaintiffs are successful in this lawsuit, there may not be any alternate jobs at which they could be employed -- since Johnson Controls' Battery Division may cease to exist.

While President Coolidge may have been overstating things when he said that "the business of America is business," it is certainly true that the business of business is business. Staying in business is the first priority of any business. If a BFOQ defense means anything, it surely means that employers cannot be required to hire employees who threaten the very existence of the business.

A policy that permits employers to use the risk of catastrophic tort liability exposure as a BFOQ defense would not interfere with the rule established in *Manhart*. First of all, it would not serve as a defense in those situations where an employer would engage in invidious discrimination and thereby pander to customers' prejudices and bigotry in order to increase business. Nor would the policy detract from the holding of this Court in *Manhart* that differential costs incurred in providing benefits provided to employees cannot justify sex discrimination.

An employer's desire to avoid tort liability should be considered a defense because it encompasses legal considerations independent of the economic consequences to the employer. Tort liability costs are a way of measuring costs imposed on society by the conduct giving rise to the liability. As Judge Posner pointed out, "The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers' blood streams." *Johnson*, 886 F.2d at 905. In other words, denying a BFOQ defense to Johnson Controls not only will damage Johnson Controls but will also impose significant costs on society as a whole -- employees, consumers, and (in particular) the children of employees. Nothing in *Manhart* requires such a result.

V. PUBLIC POLICY FAVORS A POLICY PERMITTING EMPLOYERS TO ADOPT FETAL PROTECTION POLICIES

Permitting consideration of potential tort liability as a BFOQ defense would serve the broader public interest of allowing employers to take into consideration societal costs. Those costs to society include costs incurred by

consumers, other employees (who would suffer if the employer was forced to close down), as well as the children exposed to lead. If an employer recognizes a health hazard and takes steps to prevent that danger, the courts should recognize the legitimacy of such conduct.

One can assume that the marketplace places an equal value on men and women as employees. If a company excludes fertile women from its employment pool, it will be economically disadvantaged because it thereby increases the bargaining power of those remaining in the employment pool. Accordingly, if a company acts rationally, it will not act against its economic interests in that manner unless there is a countervailing cost to the non-discriminatory policy. Johnson Controls is paying a cost in adopting its fetal protection policy by denying to itself otherwise qualified female employees, but it has rationally determined that that cost is outweighed by the costs it would incur if the policy were not adopted.

It is true that some companies might choose to discriminate invidiously on the basis of sex for no rational reason. In those instances, pretextual reasons given to justify the discriminatory policies are and should be illegal. However, there is no evidence that Johnson Controls adopted its fetal protection policy for any reason other than the stated reason of protecting the fetuses of employees. When such policies are adopted for non-pretextual reasons, the costs associated with tort liability serve as a useful measurement to employers of the value that society places on the safety and health of children. When fetal protection policies are not adopted for pretextual reasons, employers should be allowed to use those costs of liability as a defense in a Title VII action.

CONCLUSION

If Petitioners are successful, employers in the future may be faced with the Hobson's Choice of violating Title VII or subjecting unborn children to the risk of safety hazards and subjecting themselves to the risk of bankruptcy.

The solution called for by Petitioners is a utopian one. It would require nature to change so that health effects of lead exposure are evenly distributed between males and females. That cannot be done. Secondly, Petitioners would require technology to do what is not technologically feasible.

The likely result of a victory for Petitioners would be the shut-down of Johnson Controls' Battery Division. That would only create equality on the unemployment line, rather than on the production line.

For the foregoing reasons, *amicus* respectfully requests that the Court uphold the Seventh Circuit's decision.

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OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The *Industrial Hygiene Law Project* is a group of professionals who are concerned about legal issues pertaining to the practice of industrial hygiene. It was founded by Margaret Levin Phillips, Ph.D., M.H.S., an industrial hygienist employed in the manufacturing sector. Dr. Phillips anticipates that she will be involved in the design and implementation of fetal protection programs because of her professional expertise. She has worked in laboratory and manufacturing facilities while she was pregnant or contemplating pregnancy. Cheryl E. Amana is a J.S.D. Candidate at Columbia University School of Law. Ilise L. Feitshans, (Assistant Director of the Legislative Drafting Research Fund at Columbia University School of Law) serves as legal counsel for the project. Ms. Feitshans is also a doctor of science candidate in public health.

SUMMARY OF ARGUMENT

Title VII was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded sexual stereotypes and racial prejudice that has its origins in social and economic factors beyond the scope of employment. Title VII was not designed to address issues of health and welfare. Cases that have tested the limits of its jurisdiction have consistently deferred to facially discriminatory policies, when they have been supported by a health and welfare rationale.

If one accepts the notion that fetal protection policies constitute prima facie discrimination, employers will be compelled to allow women into high risk workplaces, without the benefits of risk assessment,

medical surveillance or other scientific evidence that health-related administrative agencies, can best review. Similarly, excluding all women of child-bearing capacity from such high-risk employment requires unduly stretching the narrow exceptions in Title VII, inconsistent with case law and its legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Neither approach provides a viable solution to high-risk exposures that may affect men and/or women, or answers the immediate need to protect fetal health.

Each of those approaches is antithetical to good industrial hygiene practices (outlined below) and sound public health strategies articulated in public health laws. Such preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. Under the doctrine of *parens patriae*, state and federal governments have consistently recognized the need on occasion to abridge or modify legal views of individual rights, in order to preserve the public health. Examples abound, including but not limited to: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases); restriction of the person, in cases of quarantine; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances. Federal law regulations also exist that divide groups of workers according to sub-populations. For example, the Nuclear Regulatory Commission (NRC) has different standards for workers under age 18 compared to other workers. NRC has also proposed regulations that have

different standards for the general public, for exposed employees, and for "fetal exposure" in the event of so-called "declared pregnancy".

The U. S. Congress has spoken to these important occupational safety and health issues in two regards: First, the Occupational Safety and Health Act of 1970 grants the Secretary of Labor authority to protect workers "functional capacity" against "recognized hazards", including reproductive health hazards in the workplace. This Respondent has not violated the relevant OSHA lead regulations, nor been cited by OSHA for unacceptable practices regarding reproductive health hazards. And, contrary to Petitioner's view of health concerns, weaknesses in OSHA regulations and the agency's reluctance to grapple with these issues should not give rise to the inference that OSHA is not the proper avenue for jurisdiction of these important issues. Rather, there is ample precedent for OSHA to play a more active role in this area without passing judgement on Title VII Civil Rights claims. Second, Rep. Pat Williams (D.-Montana) has introduced new legislation in the U.S.Congress on this subject. He has stated his intention to hold hearings (as indicated in the *Congressional Record*) pending the outcome of the case at bar. These considerations require judicial restraint, in deference to the expressed will of the legislature, so that these issues may be resolved under OSH Act or by new legislation.

In conclusion, this Court therefore need not reach Title VII's constitutional issues in order to uphold the decision of the Court of Appeals in this case, applying different reasoning but agreeing with the result.

ARGUMENT

I. Title VII Does Not Adequately Address the Problems Raised by Fetal Protection Policies

A. Title VII Was Not Designed to Address Issues of Health and Welfare

Title VII of the Civil Rights Act was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded sexual stereotypes and racial prejudice that has its origins in social and economic factors beyond the scope of employment. By contrast, problems of fetal protection due to occupational exposure to reproductive hazards are matters within the employer's direct control. In enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431; *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977). Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2(a) provides: "(a) Employer practices. It shall be an unlawful employment practice for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

In *International Union of United Auto Workers (IUAW) v. Johnson Controls,* 886 F2d 871 (7th Cir. 1989) Petitioners argued that any Fetal Protection Policy constitutes *prima facie* discrimination in violation of Title VII, because it prohibits employment of fertile women in high-exposure jobs in lead battery production. It is undisputed that lead is one of the most dangerous environmental toxins and that transplacental transfer of lead in a pregnant woman to her unborn child can cause a significant risk of damage. Lead, stored in the body of a non-pregnant woman, can affect her children years after her exposure. The expense of defending the company against liability in tort suits brought by harmed children, the defense argued, constituted a "business necessity" defense and also a Bona Fide Occupational Qualification (BFOQ) exception to Title VII, based on the "fundamental" differences between the sexes. The lower court agreed.

Cases that have tested the limits of Title VII jurisdiction have consistently deferred to facially discriminatory policies, when they have been supported by a health and welfare rationale. *Dothard v. Rawlinson* 433 U.S. 321 (1977) represents the far limit upon the scope of Title VII jurisdiction in matters of job safety and health; but the case does not even offer the pretense of an interest in the scientific underpinnings for its health and welfare rationale. Title VII's concern for the job-relatedness of criteria based on height and physical strength, as discussed in *Dothard*, was ultimately proven

to be less important than the personal and systemwide security concerns raised by having a female guard in a maximum security prison. Thus, the justification for BFOQ in *Dothard* was rooted in a concern for occupational health and safety in the broadest sense, but does not offer criteria or guidelines for resolving the occupational health issues that it touched upon but could not resolve. Other cases that discuss the disparate impact of employment practices regarding differing medical benefits based on pregnancy *Nashville Gas Company v. Satty*, 434 U.S.136 (1977) or women's ostensibly greater longevity, *City of Los Angeles v. Manhart*, 435 U.S.702 (1978) concern health policy-related issues, but the health and welfare aspects of these cases do not venture beyond the economic impact of unequal medical or insurance coverage for different classes of employees.

Petitioners have confused the notion of "risk" applied in the context of actuarial tables, as discussed in *Manhart,* with the concept of "risk assessment" pursuant to sound principles of industrial hygiene, stating, " While the theoretical *risk* of fetal cognitive deficit may exist whenever a fertile woman is exposed to lead, only a *small percentage* of the exposed women will become pregnant, and only a *small percentage* of their offspring will be adversely affected. [citation omitted] Thus, however, one quantifies the numbers and evaluates the risks, the only *certainty* is that the large majority of women ... lose employment solely because of their status as a woman and not because of any fetal injury caused by their employment." *Brief For Petitioners,* Docket No. 89-1215, pp.21-22, emphasis supplied.

This is not practical or sound public health policy.

If one accepts the notion that fetal protection policies constitute *prima facie* discrimination, employers will be compelled to allow women into high risk workplaces, without the benefits of risk assessment, medical surveillance or other scientific evidence that health-related administrative agencies can best review.

Similarly, excluding all women of child-bearing capacity from such high-risk employment requires unduly stretching the narrow exceptions in Title VII, inconsistent with case law and the law's legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Noting that "there is no legal or logical impediment to" including fetal protection policies within the scope of the BFOQ exception, as "an essential element of business operations", the Equal employment Opportunity Commission (EEOC) therefore concluded in its Brief in Support of Petitioners that "In our view, the contention that a BFOQ defense is absolutely unavailable for a sex-based fetal protection policy thus reflects a misreading of the BFOQ provision of Title VII" *Brief of EEOC, Amicus Curiae* in support of Petitioners, Docket No. 89-1215, at pp. 16-18.

Neither approach, however, evaluates the relevant scientific evidence pertaining to the availability of industrial hygiene practices, or engineering controls preventing harm to reproductive capacity or fetal harm. An approach based on (1) complete exclusion of female workers of childbearing age and capacity, or (2) alllowing all workers to obtain employment without regard to particular high-risk exposures runs the greater

risk of paying nominal deference to discrimination concerns, without affording any workers adequate industrial hygiene protection. Each of those approaches is therefore antithetical to good industrial hygiene practices and sound public health strategies. Neither the approach offered in behalf of the Petitioners, by EEOC as amicus, nor the Petitioner's approach provides a viable solution to high-risk exposures that may affect men and/or women, or answers the immediate need to protect fetal health. This important distinction between the reach of Title VII protections and the scope of occupational health problems makes Title VII inapposite in the context of Fetal Protection Policies: agencies that enforce equal employment laws lack the scientific expertise to effectively prohibit practices that jeopardize workers' health.

B. Title VII's BFOQ and "Business Necessity" Defenses Are Inapposite When Analyzing Risks of Reproductive Harm

This Court has long held that a policy with a disparate impact can be justified by "business necessity". Title VII's sole statutory exception is the Bona Fide Occupational Qualification, (BFOQ). The standards for applying the BFOQ were most recently discussed by this Court in *Price Waterhouse v. Hopkins* 109 S.Ct. 1775, (1989). The *Price Waterhouse* plurality's analysis of the BFOQ exception indicates that although an employer's policy or practice may appear discriminatory on its face or in its outcome, the employer will not be held liable for violations of Title VII's prohibition against discrimination if it can be proven that gender was only

one of several factors in an employment decision, and that the employer would have reached the same decision absent consideration of the prohibited information pertaining to gender, because, "To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute," *Id.*

The fact that there are indicia of sex-based discrimination is not determinative if the result would have been the same had the impermissible criteria not been applied under this standard. Since neither employers nor employees can be presumed to desire fetal harm as an outcome of employment decisions, fetal protection through the exclusion of women would be considered a BFOQ because the risk of fetal harm is an important factor other than sex, that affects normal business operations. It could therefore be argued that the desire to prevent fetal harm falls within the parameters of non-discriminatory grounds for employers' exercise of their "freedom of choice" in making decisions under *Price-Waterhouse*. This approach could be overinclusive, thereby denying employment to people whose workplace exposures do not require the restricted exposures in fetal protection policies.

Application of the *Price Waterhouse* plurality's analysis of the BFOQ to the Pregnancy Discrimination Act, 42 U.S.C. 2000-e(k) would similarly provide a strong basis for showing that fetal protection policies are not based upon "distinctions involving pregnancy [which] are mere pretexts designed to effect an invidious discrimination against members of one sex or the other.'" 429 U.S., at 135 (quoting *Geduldig v. Aiello*, 417

U.S. 484, 496-497, n.20 (1974)). Thus, Title VII could permit irrational policies as easily as justified exclusionary polices under this construct, without requiring adequate scrutiny of the underlying scientific evidence.

C. Title VII Precedents Regarding Fetal Protection Do Not Adequately Address the Problems Raised by Reproductive Health Hazards in the Workplace

The lower court approved the fetal protection policy at Johnson Controls as an acceptable approach to reducing the risk of birth defects, such as brain damage and irreparable impairment of the central nervous system, in children of female employees. Prior cases have debated the application of Fetal Protection Policies in the courts. Overall, courts have accepted the notion that such policies provide "necessary" protection, despite their economic harms to women and their implications for future harm to workers' functional capacity. When the lower court looked for standards to determine the reasonableness of the policy, it sought a rationale to justify the perception of potential harm, and evidence of the existing harm to excluded employees, following the criteria in *Wright v. Olin* 697 F.2d 1172 (4th Cir., 1982).

In *Wright,* women who were employed at lower-exposure worksites were not penalized from the standpoint of pay and seniority rights, compared to the benefits afforded to male workers in the high-exposure worksites, but women were excluded from specific "restricted" job categories. No employees were required

to be sterilized to obtain or maintain employment. The Fourth Circuit therefore held that the employer's exclusionary "Fetal Vulnerability Policy" was "rational" and not discriminatory, in light of "medical evidence" that women should be excluded from restricted areas where there were embryotoxins and chemicals that can cause reproductive harms, so long as the women were given counseling and could work elsewhere.

According to one commentator, "traditional Title VII theory has proved inadequate to the analysis of the issue", Duncan, Allyson K. "Fetal Protection and the Exclusion of Women from the Toxic Workplace" Vol 18 *North Carolina Central Law Journal No. 1, (1989).* at 68. Courts have consistently found that although such policies may appear to be discriminatory, exclusionary policies do not comport with our legal standards for discrimination and that such policies therefore may continue with minimal scrutiny of their scientific underpinnings. The *Wright* court focussed its inquiry on potential harm to the employer and the unborn as weighed against the existing economic harm to excluded employees. The court upheld the employer's exclusionary policy, stating:

> "it is not necessary to prove the existence of a general consensus... within the scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists... that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one" *Wright v. Olin* 697 F.2d 1172 (4th Cir., 1982).

This standard, as articulated in *Wright*, restated in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) and applied by the lower court could be applied to situations where the risk of reproductive or other harms is, at best, speculative. More importantly, this vague statement regarding the employer's responsibility to employees does not subject to judicial scrutiny the employer's underlying scientific evidence and methods for reducing the risks. Any exclusionary policy, regardless of its harsh provisions, or the large class of workers that are affected by it, could be justified under this view.

The view, were the lower court's opinion to be upheld, leaves two nagging questions at each of the policy's logical extremes: (1) the minimum requirements for demonstrating to the court that an exclusionary policy, in lieu of alternative protections, is justified remain unclear and (2) the circumstances that would place limits on the court's criteria, to determine when an exclusionary policy goes too far are also unknown. This gives no blueprint for drawing a distinction between impermissible harms that threaten workers' health, but must be corrected immediately through engineering controls, in contrast to cases where the employer's policy can be justified, although discriminatory in its effect. More importantly, this standard does not place a clear limit on employer policies that may unfairly harm workers, even though such policies may constitute a breach of the employer's responsibilities to protect workers.

D. Occupational Health Issues, Unlike Policies that Prevent Discrimination, Require a Careful Weighing of Epidemiological Evidence on a Substance by Substance and Worksite by Worksite Basis and EEOC Lacks This Expertise.

Reproductive hazards encompass all agents which have an adverse effect on the ability to sire or conceive and bear healthy offspring, U.S. Congress, Office of Technology Assessment, *Reproductive Health Hazards in the Workplace Washington D.C. 1985*. A complete analysis of possible reproductive impairment must include: disturbances in ovulation and spermatogenesis; male sexual dysfunction; pregnancy loss at all gestational stages; developmental defects of fetus or infant; genetic defects; low birth weight; and other abnormalities in infancy and childhood. Morton Corn, "Exposure Assessment Challenges Presented by Investigations of Reproductive Effects in the Semiconductor Industry", Ch. 14 of forthcoming American Conference of Government Industrial Hygienists (ACGIH) publication. As noted by Dr. Corn, Former Assistant Secretary of Labor for Occupational Safety and Health, there are three major types of adverse effects that may be considered the endpoints for evaluation of reproductive hazards after occupational exposure: (1) Subfertility/ Infertility; (2) Pregnancy loss; and (3) Disorders at birth or in infancy Id. For example, effects on breastfeeding, early childhood development and even learning disabilities may be included as potential outcomes to be studied.

Risk assessment attempts to describe the causal relationship between adverse effects and environmental factors such as chemicals, radiation, stress, and

pathogens, Lowrence, W.W., *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufman, Inc., Los Altos, Ca. (1976). Reliance is placed upon toxicological and epidemiological studies which relate specific agents to adverse outcomes. U.S. Congress, Office of Technology Assessment, *Preventing Illness and Injury in the Workplace,* Washington D.C. 1985, Ch. 3.

The objective of risk assessment is not simply to identify a connection between a hazardous agent and an adverse effect. Exposure to the agent must be quantified in the form of a measurable index such as air contaminant concentration, absorbed dose, or blood chemistry. The nature and severity of effects is characterized at varying levels of exposure, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch.3.

On October 3, 1988, the EEOC issued a Policy Statement on Reproductive and Fetal Hazards Under Title VII, which essentially endorsed the Wright-Hayes view, despite the weakness of the guidance from these cases, "Policy Statement on Reproductive and Fetal Hazards Under Title VII" *Fair Employment Practices Manual (BNA)* 401:6013. The EEOC criteria for a fetal protection policy, as restated by the lower court can be summarized as: (1) substantial risk of reproductive harm; (2) risk via exposure of one sex but not the other sex; and (3) ability of the policy to eliminate risk, *IUAW v. Johnson Controls*, 886 F2d 871 at 886. These criteria do not reflect the quantitative aspect of scientific risk assessment, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*,

Washington, DC 1985, Ch.3. Furthermore, risk assessment could not be easily reviewed by a court without prior administrative review by an agency that has expertise in the application of scientific evidence to occupational health criteria. Using the results of such analysis without considering the scientific context in which they were developed could cause equal or greater harm than the risk to be avoided.

The lower court noted, however, that EEOC has indicated that a fetal protection policy would not withstand scrutiny "if it is shown that there exists a reasonable alternative policy that will protect employees' offspring... that has a less discriminatory impact on employees of the restricted sex." *IUAW v. Johnson Controls,* 886 F2d 871 at 886. Application of industrial hygiene controls would constitute such an alternative, but could not be easily evaluated by an administrative agency that is not familiar with issues of occupational safety and health.

Sound industrial hygiene practice recognizes a hierarchy of controls to reduce or eliminate workplace hazards, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. The preferred approach, where feasible, is to redesign a work process to eliminate or reduce hazards by substituting materials, curtailing harmful emissions, or isolating the worker from the hazardous process.

The next option is work practice controls, which involve training employees to work more safely, or administrative controls, which limit the duration of an

employee's exposure. Fetal protection policies that are designed to minimize the risk of harm to employees' reproductive capacity can be developed within the parameters of sound industrial hygiene practice. Using exposure monitoring, medical surveillance and enhanced industrial hygiene controls, it is possible to create alternatives for control. A final resort is the use of personal protective equipment such as respirators. The rationale for this hierarchy is a preference for the most reliable method among feasible controls, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch. 9.

The ability to implement any good industrial hygiene program depends upon the hygienist's ability to tailor required programs to the substances, exposures and working population in a given workplace, *Id.* Feasibility depends upon the configuration of the workplace; the cost and availability of necessary technology; the effectiveness of worker training; and the willingness of the employer to commit resources toward developing new control technology, *Id.* Recognizing that the feasibility of controls is not a static parameter, men and women of reproductive capacity who have occupational exposure to reproductive hazards would be enrolled in programs that meet their individual needs.

These particularly sensitive matters require that an administrative agency weigh sophisticated scientific evidence reflecting the different exposure experience of each worksite within a given workplace, as well as the reproductive history and needs of the affected employees. Title VII is not, however, amenable to undertaking this non-economic, health-based risk

assessment and detailed exposure analysis and EEOC lacks the expertise to evaluate the appropriate application of industrial hygiene controls in specific circumstances.

II. Government Authority Exists to Protect Reproductive Health Without Reaching Title VII's Civil Rights Issues

A. The Government's Obligation To Protect Health Has Primacy Under the Doctrine of *Parens Patriae*.

Public health preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. The governmental authority to abridge or modify individual rights in order to fulfill its duty to ensure the public health is a fundamental tenet of the common law, Grad, Frank P., *Public Health Law Manual*, American Public Health Association, Washington., D.C. (1990); 39 American Jurisprudence 2d Health Secs. 20;22 (1968 & Supp. 1990). Under the doctrine of parens patriae, state and federal governments have consistently exercised these rights in order to protect the public health and welfare, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). Preventive measures under these laws require consideration of relevant scientific evidence and evaluation of the risks to sub-populations, followed by a targeted approach focussing on high-risk populations, in order to justify such actions.

Examples of the governmental interest in meeting the recognized need to abridge or modify legal views of

individual protections, in order to preserve the public health include: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases) Grad, Frank P., *Public Health Law Manual*, American Public Health Association, Washington., D.C. (1990); restriction of the person, in cases of quarantine [Id.]; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances *Euclid v. Ambler Realty* 272 U.S. 365 (1926). These examples support the principle that policies that may appear at first blush to be of questionable constitutionality can override other statutory provisions, because of the primacy of policies that favor public health. Consequently, fetal protection policies, which may appear to have a disproportionate impact upon potential parents, women or pregnant women in particular, may be allowed subject to regulation and careful administrative scrutiny because of their ultimate impact upon broader societal issues affecting children and their parents' reproductive health.

B. There is Precedent in the Federal Law Providing Special Occupational Health Regulations for Fetal Protection.

Federal law also provides precedent for regulation of reproductive hazards according to sub-population. For example, the Nuclear Regulatory Commission (NRC) has separate standards for persons under age 18, limiting the allowable radiation exposure of such persons to ten percent of the exposure allowed for older persons. 10 CFR 20. 104 (a). NRC has proposed regulations, effective January 1991 for the

general public, 10 CFR 20.301, and for "fetal exposure" in the event of so-called "declared pregnancy", 10 CFR 20.208, "Dose for the embryo/fetus". See: Smith, Neal and Baram Michael, The Nuclear Regulatory Commission's Regulation of Radiation Hazards in the Workplace: Present Problems and New Approaches to Reproductive Health, 13 *Ecology L. Q.* 879 (1987). These standards for special sub-populations differ from the standards applied to other employees, 10 CFR 20.101-03. 10 CFR 20.208 shows the effect of applying specialized agency expertise when establishing an exposure standard. For example, 10 CFR 20.208 (c) states that "[t]he dose to an embryo/ fetus shall be taken as the sum of... (1) the deep dose equivalent to the declared pregnant woman and (2) the committed effective dose equivalent assessed to the pregnant woman due to the intake of radionuclides, modified to take into account any established parameters that cause the dose to the embryo/ fetus to be different from that of the declared pregnant woman", U.S. Congress, OTA *Reproductive Health Hazards in the Workplace, p.405*. This standard clearly cannot be analyzed or applied with a broad brush approach that affects more than a few workers at a time.

The NRC's multi-tiered approach to radiation hazards, by classification of workers into sub-populations as described above, has not been challenged as discriminatory to date. The NRC's approach does establish however, that a series of occupational health standards can be promulgated under federal laws that are tailored to the needs of subpopulations. This Court therefore need not reach Title VII's constitutional issues in order to uphold the decision of the Court of Appeals in this case.

III. The US Congress Has Clearly Expressed Its Intention to Address these Issues

A. There Exists Jurisdiction Under OSH Act For the Secretary of Labor to Resolve These Issues

The U. S. Congress has spoken to these important occupational safety and health issues in the Occupational Safety and Health Act (OSH Act) of 1970. OSH Act grants the Secretary of Labor authority to protect workers "functional capacity", Sec. 2(b), 29 U.S.C. 651 (b) against "recognized hazards", Sec. 5(a)(1), 29 U.S.C. 654. By case law and OSHA's own rulemaking in the OSHA lead standard, 29 CFR 1910.1025, the protections within OSHA's statutory mandate include reproductive health hazards in the workplace.

OSH Act Section 5(a) (1), the so-called "general duty" clause, requires that "Each employer (1) shall furnish to each of his (sic) employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his (sic) employees", 29 U.S.C. 654 (a)(1). To meet the employer's obligation or "general duty" to provide safe and healthful employment, employers must maintain an effective industrial hygiene program that is active in two complex realms, simultaneously monitoring conditions in the workplace and research within the scientific community. It is incumbent upon the employer to become aware of the most recent developments; for employers to use the latest and most effective means for protecting against special harms, and to use this information to ameliorate working conditions.

OSH Act also grants the Occupational Safety and Health Administration, (OSHA) the authority to investigate hazards; assist in developing strategies to improve working conditions; and assisting small businesses with compliance.

This Court has held that the U.S. Congress did not intend OSH Act compliance to depend upon the results of cost-benefit analysis, *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490 (1981). Unlike Title VII's "business necessity" defense, OSH Act has no monetary limitations on the costs of engineering controls, biological of monitoring or other industrial hygiene practices that can be required to enforce occupational safety and health laws, (although variances can be granted by the agency on a case by case basis). This underscores the sharp scientific differences between OSH Act and Title VII, and the need to reaffirm OSHA's primacy in crafting regulations that govern the employers' policies, in order to uphold occupational safety and health.

In the preamble to its final standard for occupational exposure to lead, OSHA recommended that prospective parents maintain blood lead levels below 30 micrograms per 100 grams, "Occupational Safety and Health Administration Notice on Issuance of Final Standard for Workplace Exposure to Lead," *Federal Register* 43 FR 52952 November 14, 1978. et. seq. This level represents the upper range of normal blood lead levels for adults who do not have occupational exposure to lead, according to the American Conference of Government Industrial Hygienists, *Documentation of the Threshold limit Values and Biological Exposure Indices* 5th

Ed., Cinn. Ohio 1986. OSHA asserted, without substantiating its statement, that the 30 microgram per 100 gram limit would "minimize" reproductive harm, 43FR52952 et seq. Yet, this level is the upper limit of the acceptable range, recommended by the Centers for Disease Control, National Academy of Sciences and the Environmental Protection Agency: ".. the blood lead level in children should be maintained below 30 micrograms per 100 grams with a population mean of 50 micrograms per 100 grams. Levels above 30 micrograms per 100 grams should be considered elevated" and therefore subject to medical controls, [Id.].

Using this approach, OSHA did not develop express protections for prospective parents employed in the lead industries. The medical removal requirements of the lead standard are triggered by blood lead levels of 50 micrograms per 100 grams or by medical determination "that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead" 20 CFR 1910. 1025(k)(1)(ii)(A). OSHA's lead standard therefore permits but does not require medical removal or special protective measures for prospective parents under a broad interpretation of this rule. In addition, the need to prevent an imminent danger of fetal harm could be viewed as an "increased risk of material impairment to health" that would trigger protections articulated in this rule. Thus, OSHA did not clearly address the issues of fetal protection that it discussed and regulated in the final lead standard, but could concievably enforce special protections against prenatal exposure in cases of high-risk, without causing undue exclusion of large classes of employees.

To do so would be consistent with OSHA case law, directing the employer to prevent the effects of "recognized hazards" of lead under Section 5(a)(1) of OSH Act, 29 U.S.C. 654, and under *ASARCO v. OSHRC* 746 F.2d 483, (9th Cir. 1984). In an otherwise exacting standard, such indirection regarding fetal protection inhibited fulfillment of OSHA's mandate to protect working men and women from impairment of functional capacity because of lead exposure. This weakness in OSHA's regulatory approach should not be used to undermine its jurisdiction.

The Respondent has not violated the relevant OSHA lead regulations, or been cited by OSHA for unacceptable practices regarding reproductive health hazards. And, contrary to Petitioner's view of health concerns, weaknesses in OSHA regulations and the agency's reluctance to grapple with these issues should not give rise to the mistaken inference that OSHA is not the proper avenue for jurisdiction of these important issues.

It would cause needless duplication of governmental regulatory efforts and undermine administrative concepts of deference to the agency's legislative mandate for EEOC to acquire the necessary expertise to enforce the case by case protections against high-risk exposures. The proper avenue for redress against exclusionary policies therefore lies under OSH Act's enforcement mechanism. Unlike purely economic job-related discrimination which looks to societal factors beyond the worksite, exclusion of women of childbearing capacity is directly related to the employer's decisions regarding the hazards that will exist within the

workplace. Since reproductive hazards in the workplace are under the employer's control, under OSH Act, the cost of compliance is not a defense. Under OSH Act, employers can be required to clean up the workplaces. By contrast, there is no Title VII precedent that specifically requires employers to provide safe and healthful workplaces. These important differences between Title VII and OSH Act's administrative authority can dramatically change the outcome of litigation concerning exclusionary policies. The time and resources that have been used to bring cases under Title VII against exclusionary policies could therefore be better used to petition OSHA for effective enforcement of the existing regulations and its statutory mandate to resolve this important problem.

B. The US Congress Has Expressed Its Intention to Create Special Legislation to Address Reproductive Health Hazards and Judicial Restraint Requires that Courts Defer to the Legislature to Fill Any Regulatory Void In Existing Laws

Given that the potential for fetal harm also raises issues that traverse the traditional realm of industrial hygiene, which is usually limited to monitoring exposures within the workplace and outcomes that directly affect workers themselves, it is possible that reproductive health hazards in the workplace may in fact present new issues of law that require special legislation, beyond the scope of ordinary occupational health jurisdiction. Questions raised by fetal protection may therefore be best resolved through the development of new legislation

that specifically targets reproductive health hazards.

Rep. Pat Williams has introduced draft legislation on this subject, and has stated his intention to hold hearings as indicated in the Congressional Record, pending the outcome of this case. According to Rep. Williams' comments, printed in the Congressional record [Congressional Record, March 29, 1990, "Sterilization or Your Job", comments by Hon. Pat Williams, (D-Montana) introducing HR4420, the "Employee Protection Act of 1990" has the stated purpose to address the issues raised by Johnson Controls. Rep. Williams stated,

> "This legislation is partially in response to Johnson Controls... I intend to urge my chairman to hold hearings on this bill this year, but not to consider this legislation until after the Supreme Court issues its opinion in 1991".

The difficult scientific and epidemiological questions raised by fetal protection may best resolved through the development of new legislation that specifically targets reproductive health hazards. It is therefore possible that the special issues raised by reproductive health hazards emanating from the workplace but affecting the health outcomes discussed by Dr. Corn, can only be resolved by a special statutory mechanism that will evaluate reproductive hazards on a much narrower basis than the present dichotomy between exclusion or allowing all workers to enter the high-risk workplace Corn, Morton. "Exposure Assessment Challenges Presented by Investigations of Reproductive Effects in the Semiconductor Industry", Ch.

14 in forthcoming ACGIH publication.

Rep. Williams' comments implicitly raise the question whether the courts in general, and Title VII actions in particular, provide the proper avenue for making determinations regarding fetal protection policies, in light of their important health and safety questions and their ultimate impact upon the maternal and child health and welfare of future generations. It is possible that the decisions to be made in the realm of fetal protection are inherently political, and therefore should be resolved by the legislature through new laws that specifically target reproductive hazards and directly address issues that were not discussed in the legislative history of OSH Act or Title VII. Such legislation could further enable one agency to acquire the necessary expertise and develop the criteria for risk assessment and review of employers' claims regarding the ostensible justification for exclusion, by sorting out the differences between scientific evidence that genuinely involve high-risk exposures to lead, teratogens or other fetotoxins, and the adverse impact of stereotypes upon employment opportunities. In addition to facing a higher level of OSHA scrutiny until the workplace as been made safer, it may also be possible to set statutory limits upon the employer's expense for compliance, or could provide avenues for review of complaints and class actions pertaining to the validity of fetal protection policies in light of the dangerous exposures and risk assessment in specific circumstances.

This rare pronouncement by the legislature prior to the completion of a judicial opinion provides a powerful argument favoring judicial restraint and

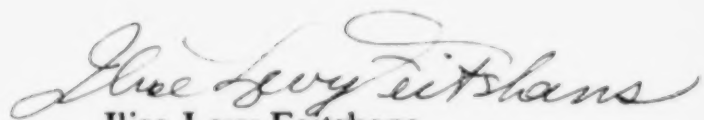
allowing for the issues raised in a case to be considered by a legislature; such a clear legislative directive is unprecedented. These considerations require judicial restraint, in deference to the expressed will of the legislature that these issues be resolved under OSH Act or by new legislation.

IV. Conclusions

The judgement of the court of appeals should therefore be upheld.

Respectfully submitted,

Jack Levy,
Counsel of Record



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No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Petitioners,

VS.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL SAFE WORKPLACE INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

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STATUTES:

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*	*passim*
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	*passim*

MISCELLANEOUS:

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR THE NATIONAL SAFE WORKPLACE INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENT

The National Safe Workplace Institute respectfully submits this brief as amicus curiae in support of the respondent.[1]

INTEREST OF THE AMICUS CURIAE

The National Safe Workplace Institute (the "Institute") is a national, not-for-profit research and education organization devoted to issues of workplace safety and health.

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[1] The written consent of each of the parties to the filing of this brief has been filed with the Clerk.

The Institute has prepared and published research and reports on a variety of workplace safety issues, investigated and intervened in workplace safety disputes, provided expert testimony to congressional hearings, acted as an international clearinghouse for information on job safety issues, and encouraged corporate and government entities to be fully accountable for workplace safety and to adopt and require safe work practices.

The Institute's work has been widely recognized as effective and important. Gerald Scannell, the Administrator of OSHA, has referred to the Institute as "the social conscience of the nation on job safety issues." William E. Brock, assessing the impact of his tenure as Secretary of Labor, said that "[a]ny accomplishments we made to improve workplace safety were due in large measure to [the Institute]." ABC News characterized the Institute as "the most effective and independent organization on worker safety issues in the U.S." As a result of its efforts, the Institute has received the J. William Lloyd, MD, Award from the United Steelworkers of America, the William Steiger Memorial Award from the American Conference of Industrial Hygiene, and a special service award from the *Engineering News-Record.*

The Institute's research and advocacy has included substantial work in the area of fetal protection policies. Two of the Institute's directors recently appeared on the MacNeil-Lehrer News Hour's program on the Johnson Controls case. The Institute strongly supports equal opportunity for women. It agrees with petitioners and their amici that fetal protection policies may be used as a pretext for sex discrimination and it condemns such discrimination. But it also acknowledges that some fetal protection policies are not grounded in discrimination. The Institute believes that an open-minded investigator would be compelled to acknowledge that current medical research indicates that certain toxins in the workplace—especially lead—appear to directly damage developing fetuses in utero. That damage is different in kind and degree (and apparently occurs at much lower exposure levels) than any direct harm, reproductive or otherwise, to women and men who are exposed to the toxins. To the degree that such medical evidence merely reflects research bias, it should be condemned and ignored. But to the extent that it reflects the fact that fetuses only develop in utero in women, it must be heeded.

Much of the Institute's work involves trying to increase corporate accountability for workplace safety and health. To hold employers accountable, they must be given discretion to respond to health and safety hazards. That should be true whether the hazards are to employees, customers, bystanders, or children. This Court should not interpret Title VII or the Pregnancy Discrimination Act in such a way as to undermine the equally important interests served by the Occupational Safety and Health Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, petitioners' position is clear and simple: they claim that Title VII and the Pregnancy Discrimination Act prohibit employers from excluding women—even pregnant women—from jobs that pose a substantial risk to the developing fetus. In their view, Title VII requires employers to allow women to balance the health risks to unborn children against the benefits of the particular job.[2] As the

[2] Petitioners' interpretation of Title VII would preclude *any* differential treatment of women that an employer might propose to deal with fetal risks. Thus, if sound medical judgment warranted use of respirators or other protective devices by women only, an employer policy requiring that use would be deemed unlawful.

amicus brief for the American Civil Liberties Union and others points out, the choice may very well be between an uncertain risk of injury to unborn and perhaps uncontemplated children on the one hand, and a substantial reduction in income, economic well-being, and possibly even health (due to loss of health insurance) on the other.

Respondent, while not disputing the fact that substantial competing interests are at stake, disagrees that the choice must be left to the employee. It argues that under narrow circumstances—where workplace exposure results in a demonstrable and substantial fetal risk and no reasonable alternatives exist—an employer should be permitted to exclude women capable of bearing children from jobs involving exposure to those toxins.

This Court is asked to choose between those alternative interpretations of federal law, a difficult task from the standpoint of both public policy and statutory interpretation. That task is not made any easier by arguments that ignore relevant differences between the reproductive functions of men and women, that claim that the tragic effects of lead exposure on developing children are really not that bad, or that assert that Johnson Controls should "simply" eliminate the problem by perfecting a lead-free battery. Although lead exposure at some levels might very well damage both sperm and ovum, and thus cause infertility and perhaps birth defects, the biological fact that fetuses develop only in women means that there is another, qualitatively different opportunity for fetal injury when pregnant women are exposed to toxins such as lead. The brain and nervous system develop in utero, in women. In young children and developing fetuses, the brain and nervous system are especially vulnerable to the effects of lead. Johnson Controls' policy is intended to protect children from the serious effects of direct exposure to lead in utero.

Thus, the difficult choice required by this case is a real one. The question, as petitioners imply, is one of who should make that choice. Does Title VII, and sound public policy, require that the choice be left to the individual employees? Or does federal law permit—or perhaps require—employers to make that choice for them? The National Safe Workplace Institute believes that employers must be held *fully* accountable for workplace injuries and illnesses and thus must be given discretion to make safety and health decisions, even when those choices are contrary to the economic interests of employees. That philosophy is embodied in the Occupational Safety and Health Act. Employers in this country are *not* free to offer high wages in return for increased health and safety risks. Employees are *not* free to accept an unsafe workplace in return for the higher wages employers might be willing to pay to avoid the cost of safety. For good reason, federal policy does not leave these choices to the workers.

Federal statutes should be interpreted, whenever possible, harmoniously. In light of the requirements and the underlying policy of the Occupational Safety and Health Act, it would be disharmonious in the extreme to interpret the bona fide occupational qualification exception—and the concept of "normal operation" of a business—to exclude concerns over safety and health. Under petitioners' interpretation, in assessing what is "reasonably necessary to the normal operation of [its] business," an employer can only take into account what is necessary to get the job done, and not any impact the job might have on the health or safety of the employee or others. But to ignore health and safety risks is distinctly *abnormal* and contrary to federal policy. Neither the language nor the intent of Title VII requires such an interpretation.

The Institute believes that in the rare case where exposure to toxins in the workplace results in a significant health risk only to women—or only to men, or only to members of some other group—and no reasonable alternatives exist, employers should be permitted to exclude members of the affected group from jobs where such exposure is inevitable. This appears to be such a rare case.

ARGUMENT

I. The "Business Necessity" Test Applied By The Courts Below Is Inapplicable.

Following the lead of the Fourth, Fifth and Eleventh Circuits,[3] both the district court and the court of appeals held that Johnson Controls' fetal protection policy should be evaluated under the "business necessity" test or defense.[4] But the business necessity test—as to which the burden of proof is on the plaintiffs—was never intended to apply to facially discriminatory employment practices. This Court has consistently applied the business necessity test only to cases involving facially neutral employment practices that have a disparate impact on particular groups. See, *e.g.*, *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and intervening disparate impact cases.

[3] *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982); *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984).

[4] The district court characterized business necessity as a "defense," which Johnson Controls would have to prove. Pet. App. 117a. After it reached that conclusion, this Court decided *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), which made it clear that business necessity is part of the test for discrimination, and that plaintiffs bear the burden of proof on this issue. The court of appeals therefore held that the UAW had the burden of proving that the Johnson Controls policy was not justified by business necessity. Pet. App. 29a-30a.

The court of appeals reasoned that the framework used by this Court for evaluating disparate treatment cases "was not intended to be an inflexible rule" (Pet. App. 21a) and that fetal protection policies should be analyzed under the business necessity test because they "involve[ ] motivations and consequences most closely resembling a disparate impact case." *Id.* at 23a. But the consequence of the fetal protection policy—exclusion of nearly all women from certain jobs—even more closely resembles the consequence of disparate treatment, and benign motivation has never been thought to justify a reduced level of scrutiny in cases of clear discrimination. Thus, in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), this Court declined to find that the employer's practice of requiring women to make larger pension fund contributions was justified by the fact that women, as a class, live longer than men. The employer argued that pension benefits were more costly for women than for men—the kind of motivation that might be accepted in a disparate impact case. But the Court held that such a motivation could not save a facially discriminatory policy.[5]

[5] The issue in *Manhart* was whether the employer's policy was facially discriminatory. The employer argued that it was not, because women lived longer than men and the cost (and value) of their pension benefits was thus greater. For present purposes, it is important that the Court did not apply business necessity analysis on the ground that the economic motivation for the policy more closely resembled that of a disparate impact case. Instead, it applied disparate treatment analysis. *Manhart* did not involve exclusion of women from jobs and thus was not (and could not be) evaluated under the bona fide occupational qualification exception.

The differences in analysis required for disparate impact and disparate treatment claims is perhaps best seen in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The Alabama Board of Corrections required that applicants for prison guard positions meet certain minimum height and weight requirements and also prohibited women from working in "contact positions" in maximum security prisons for men. This Court applied the business necessity test to the former requirement, which was facially neutral but had a disparate impact on women. But it held that the latter requirement—which was facially discriminatory—could be justified, if at all, only under the bona fide occupational qualification exception applicable to disparate treatment cases. The motivation for both parts of the Alabama rule was the same: a belief that only burly individuals—and in some cases, only burly men—could handle potentially violent and abusive prison behavior. But the required analysis was different because one claim alleged disparate impact and the other disparate treatment.

It would be particularly inappropriate to apply business necessity analysis to facially discriminatory employment practices following this Court's decision in *Wards Cove*. There, the Court explained that the burden of proving that an employment practice was not justified by business necessity "must remain with the plaintiff, for it is he who must prove it was 'because of such individual's race, color, [sex],' etc., that he was denied employment opportunity." 109 S. Ct. at 2126. The rule placing the business necessity burden on the plaintiff "conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on legitimate *neutral* considerations." *Ibid.* (emphasis added).

But in a disparate treatment case, once the plaintiff proves that the employer's action "was [*not*] based solely on legitimate neutral considerations," the plaintiff has fulfilled his burden and has proven that the action was "because of such individual's * * * sex." At that point, the burden of proving that the employment practice was, nevertheless, not unlawful is on the defendants. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989) (once plaintiff proves discrimination, employer has burden of proving that it would have taken the same action absent discrimination); *Dothard*, 433 U.S. at 332-337 (once disparate treatment is established, burden is on defendant to demonstrate applicability of the bona fide occupational qualification exception).

In this case, there is no question that Johnson Controls' policy is facially discriminatory. It openly imposes a restriction on women that it does not impose upon men. Once that has been shown, the plaintiff has established far more than a weak prima facie case of disparate treatment of the sort examined in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).[6] Instead, the plaintiff has established discrimination based on sex, and it is for the defendant to prove that some reason exists for

[6] When a plaintiff establishes a weak prima facie case under the *Burdine* framework, the defendant need only articulate a legitimate nondiscriminatory reason for its action and the burden remains on the plaintiff to show that the defendant's action was based not on that reason but instead on discriminatory reasons. 450 U.S. at 253. *That* is the framework that should not be regarded as "an inflexible rule." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576 (1978). Once there is "smoking gun" evidence (or an acknowledgment) of disparate treatment, the plaintiff need prove no more and the burden of proving any exception or defense is on the defendant.

departing from the usual rule that such discrimination is unlawful.

II. The Bona Fide Occupational Qualification Exception May Apply To A Well-Founded Fetal Protection Policy.

A facially discriminatory employment practice may nevertheless be lawful if "sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Section 703(e), 42 U.S.C. § 2000e-2(e). The burden of proving that this "BFOQ" exception applies is on the employer. *Price Waterhouse*, 109 S. Ct. at 1789; *Dothard*, 433 U.S. at 333. In addition to holding that the policy met the requirements of the business necessity defense, the court of appeals held that "Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense." Pet. App. 42a.[7]

Under the BFOQ defense, the issue in this case is whether the exclusion of women from the battery line, first, is "reasonably necessary" and, second, relates "to the normal operation of" the business of Johnson Controls' battery division. There is little disagreement as to the proof necessary on the first issue. It would not be "reasonably necessary" to exclude *anyone* from the battery line if there were reasonable alternatives to exclusion. If the use of protective devices, reasonable changes in operations, or application of engineering controls would make the battery line safe for all workers, they should be required, notwithstanding the fact (within limits) that

[7] In the district court, Johnson Controls had also argued that the BFOQ defense applied, but because it did not view the company's policy as facially discriminatory, the court did not reach the BFOQ issue. Pet. App. 116a n.5.

they might impose some costs on the employer. It would also not be "reasonably necessary" to treat women differently from men if the objective of the company's policy did not require that discrimination, *i.e.*, if the goal of fetal protection equally required the exclusion of men. Thus the court of appeals, the United States and the Equal Employment Opportunity Commission as *amici curiae*, the petitioners and the respondent essentially agree that the company must prove that there are no reasonable alternatives and that the risk of fetal injury at the lead levels involved is substantially greater or more probable when women are exposed to lead than when men are exposed to lead.

The more contentious legal issue in this case is whether fetal protection relates to the "normal operation" of Johnson Controls' business. Petitioners assert (Br. at 29-33) that the BFOQ defense permits employers to exclude women from jobs only when women are not capable of performing the job duties. Under their theory, even women who are actually pregnant cannot be excluded from the production line or treated differently from men (*e.g.*, required to use respirators or other protective devices) unless they are unable to "produce batteries as efficiently and proficiently as anyone else." *Id.* at 31.

The issue, in petitioners' view, is one of personal autonomy. Although employers must be permitted to decide "what skills employees must possess to perform a particular job," (Pet. Br. at 33), "where the employer's reasons for excluding workers [relate to] *non-job-performance related concerns* * * * there is *no* reason for permitting an employer decision as to what is best for an employee to override the contrary, and personal, decision of the employee whose job rights would be adversely affected by the employer's decision." *Id.* at 34. In their view, the par-

ticular employee alone should be permitted to determine "the appropriate relative balance between [her] employment interests and fetal health concerns * * *." *Id.* at 37-38.

It is at this point that the Institute must respectfully disagree with petitioners. The BFOQ exception is not so narrowly drawn as to preclude consideration of all "non-job-performance related concerns." And, as a matter of federal safety and health policy, there is *every* reason to permit—and even to require—employers to decide what is best for employees and to override their personal decisions as to the appropriate balance between their employment or economic interests and safety concerns. If we are to hold employers accountable for workplace safety and health, we must give them the authority to take such steps as are reasonably necessary to ensure safety and health.

As Judges Posner and Cudahy point out in their dissenting opinions below, and as the United States and EEOC argue as *amici curiae*, there is nothing in the language of the BFOQ exception that limits employers to performance-related concerns.[8] To the contrary, the statute permits an employer to discriminate if "reasonably necessary" for the "normal operation" of the business. And it would be distinctly *abnormal* for an employer to operate its business without taking into account the effects it might have on the health and safety of employees and third parties, including fetuses. As Judge Posner put it, "[i]t is possible to make batteries without considering the possible consequences for people who might be injured

[8] The Pregnancy Discrimination Act did not limit the scope of the BFOQ defense at all. Instead, it made it clear that the defense would apply to pregnancy (and potential pregnancy).

in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." Pet. App. 64a.

This Court has recognized that concern for the well-being of others may support application of the BFOQ defense. In *Dothard*, 433 U.S. at 336, the Court held that because employment of women in "contact positions" at male penitentiaries "would pose a real threat * * * to the basic control of the penitentiary and [the] protection of its inmates and other security personnel * * * the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job * * *." If Title VII permits the exclusion of female prison guards to protect the safety of inmates, it should also permit the exclusion of women to protect the health of fetuses. See also *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), in which the Court recognized that age (under 60) might be a BFOQ for an airline flight engineer if it were shown that public safety would be impaired by allowing older engineers.

Perhaps the BFOQ exception *could* be read to apply only to situations where being of one sex or the other is reasonably necessary to the performance of job duties, but it *should* be read more broadly to permit consideration of other concerns. If nondiscrimination were the only relevant federal policy, perhaps petitioners' interpretation might have merit. However, nondiscrimination is *not* the only relevant policy. There is also an important federal policy of promoting occupational safety and health. That policy not only favors respondent's interpretation of the BFOQ exception, but it also undermines the philosophical foundation of petitioners' argument.

The Occupational Safety and Health Act ("OSH Act") flatly rejects the notion that employees have the right

to balance their employment/economic interests against their safety and health concerns and to decide on their own, without employer "interference," what risks to take. Opponents of the OSH Act have argued that the market should govern, and that employees should be left free to decide how much workplace safety and health to "buy." See, *e.g.*, W. Viscusi, *Risk By Choice* 156-162 (1983); R. Posner, *Economic Analysis of Law* 311-312 (3d ed. 1986). In their view—like that of petitioners—employees should be permitted to sacrifice their own safety for higher wages by accepting, for example, a higher-paying job at a "dirty" factory over a lower-paying job at a "clean" factory.

But Congress rejected that approach when it adopted the OSH Act. That statute recognizes that there are sound reasons for *not* permitting employees to make these choices on their own. To begin with, employees often lack the technical information and skills necessary to evaluate the risks properly. W. Viscusi, *Risk By Choice* 59-75; D. Nelkin & M. Brown, *Workers At Risk* 149-162 (1984); M. Green & N. Waitzman, *Business War On The Law* 14-16 (1981). Even with complete information, when it comes to evaluating infrequent future hazards, an unrealistic "it won't happen to me" attitude often prevails. D. Nelkin & M. Brown, *supra* at 94-96; M. Green & N. Waitzman, *supra* at 16. It is particularly difficult to accurately balance uncertain future risks against present needs. D. McCaffrey, *OSHA and the Politics of Health Regulation* 46-47 (1982); Sunstein, "Legal Interference with Private Preferences," 53 *Univ. Chi. L. Rev.* 1129, 1164-1169 (1986). And even when workers properly assess the risks to themselves, they may not properly assess externalities and effects on others. W. Viscusi, *Employment Hazards* 94-96 (1979). There are other reasons for preferring federal regulation of workplace safety and health to market forces and "free choice,"[9] but suffice it to say that Congress has decided that, as a matter of federal policy, workers do *not* have the right to decide on their own how much safety they want to "buy."

The OSH Act not only authorizes the Occupational Safety and Health Administration ("OSHA") to promulgate mandatory health and safety standards, but it also requires employers to provide safe workplaces. OSH Act Section 5(a)1; 29 U.S.C. § 654(a)(1). Even if a particular hazard is not covered by an OSHA standard, this "general duty clause" requires employers to follow safe practices.[10] In addition, scores of federal and state statutes and common-law provisions hold employers accountable for the safety of employees, customers, bystanders and others, including fetuses. Surely petitioners and many of their *amici* might join in a lawsuit if a fetus were injured or killed because of the unsafe practices of an employer. In these circumstances, it defies common sense—and federal policy—to argue that the concept of "normal operation" of a business cannot take into account harm that might come to employees or their future children.

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[9] See, generally, R. Posner, *supra* at 311-312; M. Green & N. Waitzman, *supra*, at 8-21, 95-114; N. Ashford, *Crisis In The Workplace* (1976); J. Page & M. O'Brien, *Bitter Wages* (1973).

[10] Moreover, the OSH Act is clearly intended to set only minimum standards for workplace health and safety. We completely disagree with the implication of the amicus brief of the American Public Health Association, *et al.*, that it is somehow inconsistent with the OSH Act and bad policy to permit individual employers to set health and safety standards more stringent that those required by OSHA regulations. The general duty clause and the entire thrust of the OSH Act is to the contrary.

III. The Court Of Appeals Properly Upheld The District Court's Award Of Summary Judgment.

Once it is recognized that a well-founded fetal protection policy *might* come within the bona fide occupational qualification exception, all that is left of this case is to determine whether Johnson Controls' policy was reasonably necessary to achieve its objective. As noted earlier (and as petitioners agree), that requires a determination of whether Johnson Controls demonstrated (1) that there were no reasonable alternatives to its policy and (2) that there was a substantial risk of injury to the fetus caused by lead exposure of women that would not be caused by exposure of men.

In the typical case, the question of alternatives would be critical. The Institute *strongly* believes that if it is reasonably possible to make the workplace safe for *all* employees, both the OSH Act and Title VII require employers to do so. Employers may not simply reduce exposure levels only so far as necessary to protect the least vulnerable sex or group, while excluding the rest. Rather, exposure must be reduced to the *lowest* level reasonably possible. Only if, at that level, the health or safety of a particular group is still impaired may an employer exclude that group.

In this case—under either the district court's business necessity theory or the BFOQ rationale that respondent also asserted in the district court—Johnson Controls had the burden of proving the lack of reasonable alternatives. It offered substantial evidence regarding some measures it tried and others it considered. Pet. App. 3a-12a. In the court of appeals, petitioners did *not* challenge the finding of no reasonable alternatives and (perhaps for that reason) it did not include that issue among the questions it presented to this Court. *Id.* at 37a-38a; Pet. i. Accordingly, this Court should now regard that issue as conclusively resolved in respondent's favor.

The question of whether Johnson Controls has proven that the risk of fetal injury is substantially greater when women are exposed to lead than when men are exposed is somewhat more complex. Once again, the district court (under an erroneous legal theory) held that Johnson Controls had met its burden of proof on this issue. Petitioners *did* challenge that holding in the court of appeals. In affirming the district court's business necessity ruling, the court of appeals held that *petitioners* had the burden of proof on this issue and failed to sustain it. If it had gone no further, we would ordinarily agree with the United States that this Court should reverse the court of appeals' decision and remand for reconsideration of this issue with the burden properly allocated to Johnson Controls. In this case, however, the court of appeals' erroneous allocation of the burden of proof did not seem to be critical to the outcome of this case. That much is evident from the court's characterization of the evidence:

> Because scientific data available as of this date reflects that the risk of harm to unborn children is confined to fertile female employees, the sex-based distinction present in Johnson Controls' fetal protection policy is based upon real physical differences between men and women relating to childbearing capacity and is consistent with Title VII.

Pet. App. 36a.

Moreover, the court of appeals did not stop there. It went on to conclude that Johnson Controls' "policy could also be upheld under the bona fide occupational qualification defense." Pet. App. 42a. The court recognized that the burden of proof under the BFOQ defense was on the com-

pany. *Id.* at 52a. And with that burden in mind, the court repeatedly held that the evidence showed that there is a special risk of fetal harm when women are exposed to lead. Pet. App. 52a-59a. The court expressly held that "there is clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure *in the womb*." *Id.* at 53a (emphasis added). The court also held that Johnson Controls' evidence demonstrated that exposure to lead in the blood at the levels regarded as reasonably safe for adults is *not* reasonably safe for unborn children in the womb. *Id.* at 53a-54a. In the end, the court held that "Johnson Controls has met its burden of establishing that the fetal protection policy is reasonably necessary to industrial safety." *Id.* at 58a-59a.

IV. Federal Safety Policy Requires That In Narrow Circumstances Fetal Protection Policies Be Permitted.

Although we file this brief in support of the respondent, in many respects the National Safe Workplace Institute agrees with petitioners and with the *amicus* brief filed by the United States and the EEOC. The Institute agrees that additional research into workplace reproductive hazards—including hazards to men—is urgently needed. It agrees that much of the present research reflects gender bias, and that researchers are too quick to find hazards to women and too slow to investigate hazards to men.[11] That research bias is certainly grounded in institutional

[11] As we point out at page 20, *infra*, we do *not* believe that the scientific evidence regarding fetal damage from lead exposure is merely the product of bias. The scientific evidence overwhelmingly suggests that exposure to lead at the levels involved in this case has a significant impact on fetal development, but does not jeopardize adult health or safety.

discrimination.. It also agrees that fetal protection policies and other measures supposedly intended to "protect" women, children and families are often either pretexts for intentional discrimination or remnants of paternalistic, discriminatory attitudes that have no place in modern society. We deplore such discriminatory measures and urge the Court to condemn them.[12]

But we depart with petitioners to the extent they imply that the fetal protection policy of *this* employer—Johnson Controls—is discriminatory. The company voluntarily agreed to permanently protect the earnings of all women who were transferred from the battery production line because of the policy. Any notion that it adopted its policy because this is a "male-dominated" company or industry (Pet. Br. 36-37) has no support in the record.[13]

[12] In some respects, the Institute may go beyond the petitioners. We believe that there should be a federal program to compensate women for lost earnings and benefits caused by the application of valid fetal protection policies. We also believe that Congress should enact a family leave act and a comprehensive national health insurance program so that availability of health care is not so closely linked to employment. And we believe OSHA should adopt a regulation to require *all* employers to do what Johnson Controls did: provide alternative employment and protect the wages and benefits of any women who are transferred from jobs because of a valid fetal protection policy.

[13] The argument found in several *amicus* briefs that Johnson Controls' policy assumes that *all* women will become pregnant and carry to term is simply wrong. The policy is based on the fact that *some* women will become pregnant and carry to term and that it is impossible to know which women will do so. Any serious effort by Johnson Controls to determine who is and who is not likely to become pregnant would itself be discriminatory and an intolerable invasion of personal privacy. Cf. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 422-423; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (age may be a BFOQ if it is impractical for an employer to make individualized assessments).

We also cannot condone petitioners' efforts to downplay the tragic effects of lead on fetuses and children and to ignore the biological—as opposed to the "cultural," "mythical" or "stereotypical"—differences between the reproductive functions of women and men. This case—and Johnson Controls' policy—is not about health risks to the reproductive systems of women and men, risks that in some cases may cause sterility or birth defects. Instead, this case is about the health risks to the brain and nervous system of developing children caused by *direct* exposure of the fetus to lead in the blood.[14] The scientific evidence in the record, and the judgment of the experts we have consulted, is that direct fetal exposure to lead presents serious risks of brain damage and functional impairment at blood lead levels well below that thought to be safe for adults.[15] And this direct fetal exposure can occur only in women.

This Court should keep in mind that medical evidence rarely rises to the level of absolute certainty. A few scientists still debate whether smoking can cause cancer and

[14] Of course, the identical legal issue might arise in other industries involving exposure to different risks. Exposure of female health-care employees to rubella and other viruses is an example that comes quickly to mind. See Coleman & Dickinson, "The Risks of Healing: The Hazards of the Nursing Profession," in *Double Exposure: Women's Health Hazards on the Job and at Home* 49 (W. Chavkin, ed., 1984).

[15] In case the Court has not had its fill of citations to medical journals, we add just a few recent articles confirming the effect of lead at relatively low levels on fetal and child development: Needleman & Catsonis, "Low Level Lead Exposure and the IQ of Children," 203 *J. Am. Med. Ass'n* 673 (1990); Shukla, *et al.*, "Fetal and Infant Lead Exposure: Effects on Growth in Stature," 84 *Pediatrics* 604 (1989); Dietrich, *et al.*, "Low Level Fetal Lead Exposure Effect on Neurobehavioral Development in Early Infancy," 80 *Pediatrics* 721 (1987).

whether the HIV virus causes AIDS, for example. It would be very bad health and safety policy to require undisputed scientific proof of a risk before an employer (or OSHA) can act to reduce or eliminate it. If we always wait for scientific certainty, it will always come too late. The question in this case is not whether it is certain or "proven" that fetal exposure to lead causes health problems or that lead exposure of men at similar levels does *not* cause birth defects.[16] The question is whether there is substantial scientific evidence that fetal exposure to lead (in women) causes impairment and that the risk is significantly greater when women are exposed to lead than when men are exposed to lead. The answer to this question is plainly yes.

Given the scientific evidence, the ultimate issue in this case is whether women should be permitted to decide on their own whether to take the risk. The entire philosophy of the OSH Act is that individual workers should *not* be forced to make that choice and do not have the right to agree to unsafe workplaces in return for higher pay, enhanced job security or better benefits. If the OSH Act does not permit women (or men) to make that choice where their own health and safety are concerned, it should not be construed to permit workers (women or men) to make that choice when the health or safety of developing children are concerned. We would make the same argument—and would urge this Court to reach the same conclusion—if this case involved a policy of excluding men from jobs because it was shown that a particular toxin caused changes in sperm which might cause fetal health problems.

[16] Thus, contrary to the brief of the American Public Health Ass'n, *et al.*, at 30 n.28, conclusions *can* be drawn from an absence of evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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